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Supreme Court of the United States

JOHN McLAUGHLIN and
CHARLES A. MICEWSKI,

Petitioners,

vs.

MICHAEL FISHER, GERALD PAPPERT,
BRUCE SARTESCHI, DAVID KWAIT,
ROBERT VON SCIO, and JAMES CAGGIANO,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the United States Court of Appeals for the Third Circuit ignore the standard of appellate review for sufficiency of evidence as established by the United States Supreme Court and in essence ignore the evidence and inferences in favor of the Petitioners, Mr. McLaughlin and Mr. Micewski, ignore the jury verdict and findings and improperly credit and accept the evidence and inferences of the Respondents, which had been rejected by the jury, when finding the evidence was insufficient and in reversing the jury verdict in favor of the Petitioners?

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, John McLaughlin and Charles Micewski, respectfully request this Honorable Court issue a Writ of Certiorari to review the non-precedential opinion of the United States Court of Appeals for the Third Circuit dated May 5, 2008 (Appendix A and Appendix B) and the Order dated June 19, 2008 denying reargument (Appendix E), which reversed the jury verdict and monetary award in favor of the Petitioners on the basis of sufficiency of evidence, and wrongly entered judgment instead in favor of the Respondents.

OPINIONS BELOW

The Opinion and Order of the United States Court of Appeals for the Third Circuit dated May 5, 2008, is non-precedential and therefore not reported. The Opinion and Order are attached as Appendix A and Appendix B. The Order dated June 19, 2008 denying reargument of the United States Court of Appeals for the Third Circuit is attached as Appendix E. The United States Court of Appeals reversed a jury verdict and monetary award in favor of the Petitioners on the basis of sufficiency of evidence. Attached and marked as Appendix C is the Order of the Honorable A. Richard Caputo of the United States District Court for the Middle District of Pennsylvania dated June 27, 2005 denying the motion for a New Trial except to the Respondent, Michael Fisher. Attached

and marked as Appendix D is the Memorandum Opinion of the Honorable A. Richard Caputo dated March 7, 2005.

JURISDICTION

The denial of reargument by the United States Court of Appeals was entered on June 19, 2008. This Petition for Writ of Certiorari is filed within the ninety day time period as allowed by Supreme Court Rules 13.1 and 13.3. Jurisdiction is found in 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

There is no constitutional issue involved. The issue is whether the United States Court of Appeals for the Third Circuit violated established Supreme Court holdings on evaluating the sufficiency of evidence and as a result substituted the Court's factual findings in place of the findings by the jury.

STATEMENT OF THE CASE

The Petitioners, John McLaughlin and Charles Micewski, were employed at all pertinent times during this litigation as special agents in the Office of Attorney General of Pennsylvania. Both had formerly been highly decorated Philadelphia Police Officers, who subsequently were employed as agents by the

Attorney General of Pennsylvania after retirement from the Philadelphia Police Department.

The present case began on October 2, 1998 when the Petitioners, Mr. McLaughlin and Mr. Micewski, filed a lawsuit pursuant to 42 U.S.C. § 1983 alleging violations of their First and Fourteenth Amendment rights pursuant to the United States Constitution for retaliation by the Respondents for Mr. McLaughlin's and Mr. Micewski's exercise of their right of speech. The Petitioners alleged retaliation as a result of their filing a civil rights lawsuit against then Pennsylvania Attorney General Fisher and the other Respondents on October 14, 1997 (A-361). Mr. McLaughlin and Mr. Micewski were then in retaliation improperly transferred to assignments where there was no work, assignments that were many, many miles from their homes, denied medical care, and denied the right to visit an ill parent. Mr. McLaughlin and Mr. Micewski were also forced to undergo numerous acts of intimidation and humiliation.

The Respondents in the present case in the civil rights action filed on October 2, 1998 were then Attorney General, Michael Fisher; then First Deputy Attorney General, Gerald Pappert; then Director of Human Resources for the Attorney General, Bruce Sarteschi; then Chief of Criminal Investigations for the Attorney General, David Kwait; then Deputy Chief of B.N.I., Criminal Division of the Attorney General, James Caggiano; and Charles Warner.

The Respondent, Charles Warner, was removed from the case once Mr. McLaughlin and Mr. Micewski rested their case (A-216). The Respondent, Mr. Fisher, was granted a new trial since Mr. McLaughlin and Mr. Micewski did not agree to remit $75,000.00 in punitive damages (A-38).

The four Respondents remaining for the appeal are therefore Mr. Pappert, Mr. Sarteschi, Mr. Kwait and Mr. Caggiano.

The case was assigned to be tried before the Honorable A. Richard Caputo in the United States District Court for the Middle District. Attorney Donald Bailey did all the pre-trial work. Present counsel, Samuel C. Stretton, actually tried the case for the Petitioners, Mr. McLaughlin and Mr. Micewski. Attorney Robert Hoffman represented the Respondents.

A trial with a jury was held before the Honorable A. Richard Caputo of the United States District Court for the Middle District of Pennsylvania. A motion for Summary Judgment had been previously denied by Judge Caputo (A-39). The trial began on Monday, February 3, 2003 with the selection of the jury. The trial continued on Wednesday, February 5, 2003, Thursday, February 6, 2003, and concluded late in the evening on Friday, February 7, 2003 with a verdict in favor of Mr. McLaughlin and Mr. Micewski.

The jury found the First Amendment rights of Mr. McLaughlin and Mr. Micewski were violated when the Appellants retaliated against Mr. McLaughlin and Mr.

Micewski. Collectively, the jury awarded $500,000.00 in compensatory damages and $1,000,000.00 in punitive damages to be split equally by Mr. McLaughlin and Mr. Micewski.

The actual verdict was as follows:

A.) Mr. McLaughlin

	Compensatory	Punitive
Mr. Fisher	$ 12,500.00	$100,000.00
Mr. Pappert	$100,000.00	$200,000.00
Mr. Sarteschi	$ 25,000.00	None
Mr. Kwait	$100,000.00	$200,000.00
Mr. Caggiano	$ 12,500.00	None

(A-299, A-300)

B.) Mr. Micewski

	Compensatory	Punitive
Mr. Fisher	$ 12,500.00	$100,000.00
Mr. Pappert	$100,000.00	$200,000.00
Mr. Sarteschi	$ 25,000.00	None
Mr. Kwait	$100,000.00	$200,000.00
Mr. Caggiano	$ 12,500.00	None

(A-299, A-300)

Post Trial Motions were filed by the Respondents.

By Order dated March 7, 2005, Judge Caputo affirmed the jury verdict with the exception of the remitter issue on punitive damages involving Mr. Fisher (A-21, A-38, see Appendix D).

Then, by Order dated June 27, 2005, Judge Caputo entered the final Order and Memorandum affirming the denial of the Respondent's Post Trial Motions (see Appendix C). For some reason, this

Order was not formally docketed until August 21, 2005 (A-17).

The Respondents then filed an appeal to the United States Court of Appeals for the Third Circuit on September 20, 2005 (A-18). Timely Briefs were filed with the United States Court of Appeals for the Third Circuit. The case was argued on December 20, 2007 before specially appointed Judges Lourie, Restani and Oberdorfer. Because the Respondent Fisher is now a judge on the United States Court of Appeals for the Third Circuit, judges from other districts were appointed to decide the case.

By Opinion and Order dated May 5, 2008, the United States Court of Appeals for the Third Circuit reversed the award in favor of the Petitioners on the basis of sufficiency of evidence and entered judgment in favor of the Respondents (see Appendix A and Appendix B). A timely Petition for Reargument en banc was filed by the Petitioners. By Order dated June 19, 2008, the three-judge panel, without allowing en banc review, denied the Motion for Reconsideration (see Appendix E).

The present Petition for Writ of Certiorari is from the above decisions by the United States Court of Appeals for the Third Circuit.

A brief summary of the relevant trial testimony is as follows.

The testimony began with several admissions (2/3 N.T. 52, A-59). The first admission in the

pleadings was that the Petitioners, Mr. McLaughlin and Mr. Micewski, had filed the lawsuit entitled *McLaughlin v. Watson* on October 14, 1997, a copy of which was marked and admitted as "P-39" (2/3 N.T. 53, 54, A-60).

The first witness to testify was the Petitioner, John McLaughlin (2/3 N.T. 59, A-61). Mr. McLaughlin had a date of birth of May 3, 1955 and was forty-seven years of age at the time of the trial (2/3 N.T. 59, A-61). Mr. McLaughlin had lived in the Philadelphia area from 1955 to February of 2000 (2/3 N.T. 59, A-61). Mr. McLaughlin had been a Philadelphia Police Officer, beginning his employment in 1977 and working continuously as a police officer until 1995 when he was hired by the Attorney General's Office through the Bureau of Narcotic Division as an agent (2/3 N.T. 60-62, A-61, A-62). Mr. McLaughlin testified that he had been a witness in court thousands of times as a police officer and as an agent with the Attorney General's Office (2/3 N.T. 63, A-62). Mr. McLaughlin went through his numerous accommodations for bravery and related matters as a police officer (2/3 N.T. 63, 64, A-62). As an agent for the Attorney General's Office, Mr. McLaughlin received initially an excellent recommendation from his supervisor, Mr. Lutz (2/3 N.T. 66, A-63).

Mr. McLaughlin testified he cooperated with the Attorney General's investigation in 1996 and 1997 concerning issues of his search warrants and trial testimony (2/3 N.T. 68, A-63). Mr. McLaughlin related how he raised issues with the various Respondents

about his contemplated filing of a civil rights litigation concerning his removal from active street duty as an agent for the Attorney General (2/3 N.T. 69, A-64). Mr. McLaughlin stated he told the Respondent, Mr. Sarteschi, Chief of the Personnel Department, that he intended to file a suit in October of 1997 (2/3 N.T. 70, A-64). Mr. McLaughlin also told the Respondent, Mr. Caggiano (2/3 N.T. 71, A-64). Mr. McLaughlin described the chain of command in the Bureau of Narcotics Investigation in 1996 and 1997. The chain went from Mr. Warner to Mr. Caggiano to Mr. Kwait to William Ryan to Mr. Pappert to Michael Fisher (2/3 N.T. 72-75, A-64 – A-65).

Mr. McLaughlin stated before October 14, 1997, he had even spoken to Attorney General Fisher directly to ask about his situation and ask if Mr. Fisher could get Mr. McLaughlin back to work on the street. He noted Mr. Fisher said he would definitely put him and Mr. Micewski back to work (2/3 N.T. 74, 75, A-65). Mr. McLaughlin testified this discussion with Mr. Fisher was in approximately March of 1997 (2/3 N.T. 75, A-65).

Mr. McLaughlin described a meeting on October 6, 1997 with some of the Respondents concerning a permanent transfer to the Norristown office into the Intelligence Unit by both himself and Mr. Micewski (2/3 N.T. 75, A-65). Mr. McLaughlin indicated pursuant to his contract, he did not have to accept the permanent transfer and he refused the same because he did not want to admit that he did something wrong (2/3 N.T. 76, A-65). After that meeting, Mr.

McLaughlin advised the various Respondents that he was going to file a suit and the suit was actually filed on October 14, 1997 as noted with "P-39" (2/3 N.T. 76, 77, A-65, A-66, A-361). Attorney Hoffman then stipulated to Mr. McLaughlin's adoption of the various paragraphs of "P-39," the Complaint (A-361), which Mr. Stretton, the attorney for Mr. McLaughlin, had read in his opening statement (2/3 N.T. 78). Mr. McLaughlin noted that portions of the Noonan Investigative Report was attached to the Complaint "P-39" (2/3 N.T. 84, A-361).

Mr. McLaughlin testified after he filed the Complaint ("P-39," A-361), he received the letter dated November 12, 1997 from the Respondent, David Kwait, temporarily transferring his assignment to Greensburg (2/3 N.T. 85, 86, A-68). Mr. McLaughlin was also shown the letter dated November 5, 1997 from Mr. Pappert, which was copied to the Respondents Fisher, Kwait and other non-defendants, confirming his re-assignment (2/3 N.T. 86-88, A-68). Mr. McLaughlin indicated this letter was also signed by Mr. Pappert, Mr. Sarteschi and Mr. Kwait (all Respondents) (2/3 N.T. 88, A-68).

Mr. McLaughlin stated that was the first time he had heard he was being sent to Greensburg, which was 306 miles, one way from his home (2/3 N.T. 89, A-69). He testified no one ever said anything to him about being transferred to Greensburg prior to the lawsuit being filed on October 14, 1997 (2/3 N.T. 89, A-69).

Mr. McLaughlin was being treated for an on-going back injury by a chiropractor and a neurologist several times each week in Philadelphia during that time (2/3 N.T. 93, A-70). He testified his injury was work related (2/3 N.T. 93, A-70). He indicated he had timely reported that incident previously (2/3 N.T. 93, A-70).

Mr. McLaughlin then testified his father suffered a heart attack on November 16, 1997 and since he was ordered to go to Greensburg on Monday, November 17, 1997, Mr. McLaughlin sought a delay to be with his father (2/3 N.T. 98, 99, A-71). He indicated he was told by Mr. Warner, Mr. Tenuto and Mr. Pace that if he were not in Greensburg on Monday, he would be fired (2/3 N.T. 99, A-71).

Mr. McLaughlin stated he had to go to Greensburg as opposed to being with his father (2/3 N.T. 99, A-71).

Mr. McLaughlin described the numerous problems he had driving to Greensburg because of his back problems and muscle spasms (2/3 N.T. 100, A-71). He stated he told Mr. Warner repeatedly and Mr. Warner told him he would be terminated if he did not go to Greensburg (2/3 N.T. 100, 101, A-71, A-72).

Mr. McLaughlin asked for permission to seek treatment with doctors in Greensburg and he was told that he had to call the Respondent, Mr. Caggiano (2/3 N.T. 102, A-72).

Mr. McLaughlin indicated he wrote several memos through the chain of command to the Respondents repeatedly objecting to the transfer because he wanted to be with his father and due to his physical problems and the inability to treat with his doctors because of the distance (2/3 N.T. 102, A-72).

Mr. McLaughlin testified he had to live away from his family during the week and reside at a Holiday Inn in Greensburg (2/3 N.T. 105, A-73).

Mr. McLaughlin stated he complained to the Respondents through the chain of command as to his problems, including the travel, the pain and the lack of doctors' treatments (2/3 N.T. 106, 107, A-73). He indicated his condition worsened and ultimately he had to have an operation on his back on October 28, 1998 (2/3 N.T. 107, A-73).

It was not until November of 1998 to April of 1999 that Mr. McLaughlin was allowed to take sick leave despite having made repeated requests for a year to the Respondents (2/3 N.T. 108, 109, A-73, A-74).

While he was at Greensburg, Mr. McLaughlin had testified no work was given to him and he was made to sit in a cubical for eight hours each day (2/3 N.T. 111, A-74). He stated there was nothing for him to do. He said he finally started to fix other employees' computers (2/3 N.T. 111, A-74).

Mr. McLaughlin testified when he first arrived in Greensburg, he was asked by the Supervisors what

he was doing there since they were not aware of this assignment (2/3 N.T. 111, A-74).

Mr. McLaughlin also stated that he did testify in court and trial proceedings in Philadelphia in 1996, 1997 and 1998 (2/3 N.T. 114, A-75). Mr. McLaughlin indicated after his back operation, he was certified by his doctor to return to work in February of 1999 (2/3 N.T. 116, A-75). He testified that the Respondents would not allow him to go back to work until April of 1999 and then sent him back to Greensburg (2/3 N.T. 117, A-76).

Mr. McLaughlin described the extreme emotional distress caused by the transfers, particularly for not being able to be with his father, not being with his family, having to live in a hotel room, and not being able to treat with his doctors (2/3 N.T. 121-123, A-77).

Mr. McLaughlin testified that in December of 1997, he tried to take sick leave and was again told he would be fired if he didn't go to Greensburg. His complaints went through to the Respondents through the chain of command (2/3 N.T. 127-129, A-78, A-79).

The next witness called by the Petitioners was Norman McGinnis, who was a Supervisory Special Agent for the Pennsylvania Office of Attorney General (2/5 N.T. 32, A-102). He testified he has known John McLaughlin and Charles Micewski, the Petitioners, since 1997 (2/5 N.T. 34, A-103). He indicated he had received a telephone call in 1997 indicating that the Petitioners, Mr. Micewski and Mr. McLaughlin, were being assigned to his office (2/5 N.T. 34,

A-103). He indicated they were assigned to him at the Essington Avenue office near the airport in Philadelphia (2/5 N.T. 35, 36, A-103). Mr. McGinnis indicated he was not aware of any other agents who had been on temporary assignment as long as Mr. Micewski and Mr. McLaughlin (2/5 N.T. 37, A-104). He testified the Respondents never gave him any instructions as to why the Petitioners were being assigned to him (2/5 N.T. 37, 38, A-104). Mr. McGinnis indicated Mr. McLaughlin was then assigned to Greensburg and Mr. Micewski to Wilkes Barre even though there were no positions at those locations (2/5 N.T. 39, A-104). He stated that the Respondents told him to treat these men differently (A-104, A-106). He was told they were not to testify in court, they were not to participate in actual enforcement or issuance of search warrants or active arrests or consensual searches or monitoring (2/5 N.T. 39, 40, A-104).

Mr. McGinnis testified that the directions came from persons who would be directly in the chain of command of the Respondents (2/5 N.T. 42, A-105). He stated he had conversations with Bill Ryan from the Criminal Division of the Attorney General's Office and the Respondent, Bruce Sarteschi, head of personnel and David Kwait, Chief of Investigations about Mr. McLaughlin and Mr. Micewski (2/5 N.T. 42, 43, A-105). He indicated there was a meeting with Mr. Kwait and Mr. Sarteschi where he was told about the restrictions on what the Petitioners, Mr. McLaughlin and Mr. Micewski, could do (2/5 N.T. 43-45, A-105, A-106).

Mr. McGinnis testified he attempted through the Respondents, Mr. Kwait and Mr. Sarteschi, to get information to counteract the innuendos about Mr. McLaughlin and Mr. Micewski through the department, but could not get any answers (2/5 N.T. 47, N.T. 106).

Mr. McGinnis stated it was his decision that he could trust both Mr. McLaughlin and Mr. Micewski (2/5 N.T. 47, A-106). Mr. McGinnis testified he would have Mr. Micewski and Mr. McLaughlin go to Essington Avenue as part of their duties, but the Respondents told him not to put Mr. McLaughlin and Mr. Micewski at the Essington Avenue location (2/5 N.T. 52-54, A-107, A-108).

In fact, Mr. McGinnis noted when Mr. Micewski was ordered to go to Wilkes Barre that Mr. Micewski sometimes became so depressed and upset that Mr. McGinnis was concerned for his safety and welfare and would travel with him (2/5 N.T. 56, 57, A-108, A-109). He also was aware that Mr. McLaughlin had many physical problems that made it difficult for him to travel (2/5 N.T. 57, A-109). Mr. McGinnis indicated he was very upset that none of the Respondents would give him common decency or common courtesy to explain why these men were being treated differently (2/5 N.T. 59, 60, A-109).

The next witness called was Michael Stiles, a former judge and a former United States Attorney, who was employed by the Philadelphia Phillies baseball team (2/5 N.T. 73, A-113). Mr. Stiles stated

when he was the United States Attorney he had a meeting with Mr. Fisher about Mr. McLaughlin and Mr. Micewski in 1997 (2/5 N.T. 75, A-113). Mr. Stiles indicated he believed he told Mr. Fisher that he was still reviewing matters involving Mr. Micewski and Mr. McLaughlin, but his position was they could not testify in court (2/5 N.T. 76, 77, A-113, A-114). Mr. Stiles was shown the original complaint filed, in which he was a named Defendant (Exhibit "P-39," 2/5 N.T. 78, A-361).

Mr. Stiles testified there was a second meeting in August of 1998 with Mr. Fisher (2/5 N.T. 78, A-114). He indicated there had been a request by Mr. Fisher for the F.B.I. to rent part of the Essington Avenue office to locate the TASK Force (2/5 N.T. 79, A-114). Mr. Stiles stated he advised Mr. Fisher that he had no objection to locating the TASK Force in the Essington Avenue building, notwithstanding the fact that one of the Petitioners was still assigned to Essington Avenue (2/5 N.T. 79, A-114). Mr. Stiles stated that Mr. Fisher was made aware that Mr. Stiles had no objection to the F.B.I. being located at the Essington Avenue office even if Mr. McLaughlin and Mr. Micewski were present (2/5 N.T. 79, 80, 82, 83, A-114, A-115). This was extremely important testimony because it directly contradicted what Mr. Fisher later told the jury.

Gerald Pappert, the First Deputy Attorney General, was then called by the Petitioners (2/5 N.T. 93, A-118). He stated he had served in that position since January of 1997 through the time of the trial

(2/5 N.T. 94, A-118). Mr. Pappert confirmed the chain of command of all the Respondents went through him (2/5 N.T. 96-99, A-118 – A-119).

Mr. Pappert testified a decision was made to send Mr. McLaughlin and Mr. Micewski to Greensburg and Wilkes Barre (2/5 N.T. 112, A-122). He indicated these were temporary, as opposed to permanent, assignments (2/5 N.T. 112, A-122). Mr. Pappert was shown a letter dated October 14, 1997 from Mr. Sarteschi, which indicated that there was still an interest in having Mr. McLaughlin and Mr. Micewski transferred to the Norristown office (2/5 N.T. 117, 118, A-124). Mr. Pappert was shown the letter dated November 5, 1997 that he sent to Mr. Micewski transferring him to Wilkes Barre (2/5 N.T. 119, 120, A-124). He indicated Mr. Fisher had been advised of these letters and agreed to the transfers of both Mr. McLaughlin and Mr. Micewski (2/5 N.T. 120, 121, A-124, A-125). He also was shown similar letters in reference to Mr. McLaughlin that he signed (2/5 N.T. 121, 122, A-125). He indicated all the Respondents, Mr. Kwait, Mr. Fisher, and Mr. Sarteschi, were involved in the transfers of the two Petitioners (2/5 N.T. 123-125, A-125, A-126).

Mr. Pappert testified Mr. McLaughlin's request not to be transferred due to the physical problems was denied by everyone, including Mr. Kwait and Mr. Ryan (2/5 N.T. 134, 135, A-128). Mr. Pappert indicated he was involved in the November 17, 1997 letter of Mr. Kwait to Mr. McLaughlin, telling him he had to go to Greensburg (2/5 N.T. 141, A-130). Mr.

Pappert testified that he was aware of the problems with the treating doctors and the move (2/5 N.T. 143, 144, A-130). Mr. Pappert stated he had nothing in writing setting forth any decision-making process to send McLaughlin and Micewski to the various locations before the lawsuit was filed (2/5 N.T. 157, 158, A-134). He also had nothing in writing before he sent the transfer letters in November about transferring them to these locations (2/5 N.T. 158, 159, A-134).

Mr. Pappert also had to admit that there were no open slots for the Petitioners to fill when the offer to go to Norristown was made to both Petitioners (2/5 N.T. 199, A-144). Mr. Pappert admitted that he could have assigned them to Norristown on a temporary basis since they could only refuse a permanent assignment, but he never made the temporary offer (2/5 N.T. 202, 203, A-145).

The next witness was then Attorney General, Michael Fisher (2/5 N.T. 215, A-148). Mr. Fisher directly contradicted Michael Stiles and said Mr. Stiles never indicated that he would not object to using the Essington office if Mr. McLaughlin and Mr. Micewski were there (2/5 N.T. 217, 218, A-149). Mr. Fisher stated he was aware of Mr. Noonan's Report (2/5 N.T. 219, A-149). He indicated he read the report (2/5 N.T. 219, A-149). He indicated he was aware of the conclusions of Mr. Noonan (2/5 N.T. 219, A-149). Mr. Fisher agreed that the Noonan Report was not able to reach any conclusion as to whether or not the Petitioners did anything wrong (2/5 N.T. 220, A-149). There was no objection to this question.

Mr. Fisher indicated he was aware of the offer of a position in Norristown (2/5 N.T. 220, 221, A-149, A-150). He was aware this offer was available on or about October 14, 1997 (2/5 N.T. 220, 221, A-149, A-150). Mr. Fisher agreed that he was in concurrence with all the personnel decisions made concerning Mr. McLaughlin and Mr. Micewski (2/5 N.T. 221, A-150).

Mr. Fisher was shown the October 14, 1997 letter from the Respondent, Mr. Sarteschi, confirming Mr. McLaughlin and Mr. Micewski could go to Norristown (2/5 N.T. 221, A-150). Mr. Fisher agreed he received the October 14, 1997 lawsuit, which was marked as Exhibit "P-39" (A-361), where he was named as a Defendant during this time period (2/5 N.T. 222-224, A-150). He also agreed that he was aware of the decisions to transfer thereafter Mr. McLaughlin and Mr. Micewski to Greensburg and Wilkes Barre (2/5 N.T. 224, A-150). He agreed that all the named Respondents were involved in this decision-making process (2/5 N.T. 224, 225, A-150, A-151). Mr. Fisher was unable to point to any discussions about transferring Mr. McLaughlin and Mr. Micewski to those locations prior to the lawsuit being filed and agreed there was no memo (2/5 N.T. 225-227, A-151).

The Respondents' witness, Attorney Joseph Whitehead from the Philadelphia District Attorney's Office testified out of turn (2/6 N.T. 10, A-176). He indicated that the District Attorney's Office in Philadelphia decided in 1996 and 1997 they would not prosecute cases where Mr. McLaughlin or Mr.

Micewski were involved and that decision remained firm through 1997 (2/6 N.T. 13, A-177).

The Petitioners then continued the case by calling the Respondent, Bruce Sarteschi (2/6 N.T. 14, A-177). He was the Director of Human Resources for the Attorney General's Office (2/6 N.T. 15, A-177). He was questioned about the Norristown offer and the fact the offer remained open in the October 14, 1997 letter (2/6 N.T. 19-25, A-178 – A-180). Mr. Sarteschi had no memos or any documents indicating consideration of transferring the Petitioners to Wilkes Barre or Greensburg before the lawsuit of October 14, 1997 (2/6 N.T. 31, 33, 34, A-181, A-182).

Mr. Sarteschi confirmed that despite Mr. McLaughlin's physical problems, the decision was made to keep Mr. McLaughlin in Greensburg (2/6 N.T. 53-55, A-187). He indicated Mr. Kwait and Mr. Pappert agreed (2/6 N.T. 55, A-187). Mr. Sarteschi was confronted with the regulations of the Attorney General's Office that appear to state that an employee cannot be on travel status for more than sixty (60) consecutive days (2/6 N.T. 62, 63, A-189). Mr. Sarteschi had to admit that the Attorney General's Office approved Mr. McLaughlin to remain on the extended travel despite the regulation (2/6 N.T. 63-65, A-189, A-190).

The last witness for the Petitioners was Charles Micewski. He testified he was fifty-three (53) years old at the time of the hearing and resided in Bucks County, Pennsylvania (2/6 N.T. 87, 88, A-195). He

indicated he lived at the Bucks County location since June of 1997 (2/6 N.T. 88, A-195). He stated he lived there with his wife and son and daughter (2/6 N.T. 88, A-195). Mr. Micewski testified he had a high school education and attended the Philadelphia Police Academy and became a police officer in 1974 (2/6 N.T. 89, A-196). He indicated he had joined the Attorney General's Office in February of 1995 as an agent in the Bureau of Narcotics Investigation (2/6 N.T. 89, 90, A-196). He indicated he had been decorated as a Philadelphia Police Officer (2/6 N.T. 90, 91, A-196).

Mr. Micewski testified that despite what the District Attorney's Office indicated, he was still testifying in court cases (2/6 N.T. 92, 93, A-196, A-197, A-202, A-203). He indicated he testified in court cases in 1997 and 1998 and even in the year 2000 (2/6 N.T. 93, A-197, A-202, A-203). He stated he continually advised all the Respondents of his testimony (A-204). Mr. Micewski testified he never had the opportunity to accept or reject the October 14, 1997 offer to go to Norristown since he was transferred to Wilkes Barre (2/6 N.T. 97, 98, A-198). He indicated the first time he became aware he was going to Wilkes Barre was when he received the letter dated November 5, 1997 (2/6 N.T. 98, A-198). He stated no one had talked to him about this transfer prior to receiving the letter (2/6 N.T. 99, A-198).

Mr. Micewski said after the October 14, 1997 lawsuit was filed, he was told he had to be interviewed by Mr. Raquet, the head of Internal Affairs in

the Attorney General's Office (2/6 N.T. 106, 107, A-200).

Mr. Micewski stated when he went to Wilkes Barre and spoke to the Regional Director, Mr. Grippi, he learned Mr. Grippi already had an intelligence officer and didn't even know Mr. Micewski was coming (2/6 N.T. 111, A-201). Mr. Micewski was told to go into "the common area" and find a place to sit (2/6 N.T. 111, A-201). Mr. Micewski stated after he was in the Wilkes Barre office, he sat there for five months without any assignments or work to do (2/6 N.T. 111, 112, A-201). He stated that because of the length of the drive, he had to stay in Wilkes Barre during the weekdays and would only come home on the weekends. Mr. Micewski had to stay at a Best Western Inn (2/6 N.T. 113, A-202).

The Petitioners then rested their case.

There was a stipulation that Patrick Meehan of the United States Attorney's Office, would have testified the same as did Mr. Whitehead from the District Attorney's Office (2/6 N.T. 165, A-215).

The Respondents then called the Respondent, David Kwait. He testified that Mr. McLaughlin and Mr. Micewski refused the offer to go to Norristown (2/6 N.T. 188, A-220). He confirmed there were no memos of discussions before the letters were sent in November of 1997 (2/6 N.T. 209, A-226).

The Respondents then called the Respondent, James Caggiano, the Deputy Chief in charge of the

Bureau of Narcotics Investigation (2/6 N.T. 221, A-229). He was questioned about other people who applied for the positions the Petitioners were transferred to (2/6 N.T. 247-249, A-235 – A-236).

The next Respondent witness was Charles Warner, the Assistant Deputy Chief (2/6 N.T. 257, A-238). Mr. McLaughlin was then called out of turn by the Petitioners on rebuttal and contradicted the testimony of Mr. Kwait (2/6 N.T. 262, 263, A-239).

The last Respondent witness was Bill Ryan, Deputy Attorney General in charge of the Criminal Division (2/7 N.T. 8, A-251). Mr. Ryan confirmed that in 1997, he was advised again by both the U.S. Attorney and the Philadelphia District Attorney that Mr. McLaughlin and Mr. Micewski could not testify in criminal cases (2/7 N.T. 14, A-253). Mr. Ryan said that there were concerns about their credibility. Mr. Ryan discussed meetings about a transfer to Norristown (A-253 – A-257).

Mr. Ryan agreed the letter dated October 14, 1997 re-offered positions in Norristown (2/7 N.T. 45, A-261). Mr. Ryan was then shown the letters reassigning the Petitioners in November of 1997 (2/7 N.T. 47, A-261).

The defense then rested and Attorney Don Bailey testified in rebuttal (2/7 N.T. 66, A-266). Mr. Bailey testified he personally filed the October 14, 1997 federal lawsuit (2/7 N.T. 77, A-269, A-361, Exhibit "P-39") and served it personally by handing the papers

to Mr. Fisher's receptionist on October 14, 1997 (2/7 N.T. 69, A-267).

John McLaughlin testified in rebuttal that he spoke to Mr. Caggiano about the Complaint after it was filed.

REASONS FOR GRANTING THE WRIT

Did the United States Court of Appeals for the Third Circuit ignore the standard of appellate review for sufficiency of evidence as established by the United States Supreme Court and in essence ignore the evidence and inferences in favor of the Petitioners, Mr. McLaughlin and Mr. Micewski, ignore the jury verdict and findings and improperly credit and accept the evidence and inferences of the Respondents, which had been rejected by the jury, when finding the evidence was insufficient and in reversing the jury verdict in favor of the Petitioners?

The basis for this request for Petition for Writ of Certiorari is that the United States Court of Appeals for the Third Circuit utilized the wrong standard of appellate review of sufficiency of evidence. Case law is absolutely clear by both the United States Court of Appeals for the Third Circuit and this Honorable Court concerning the standard of review for reversing a jury verdict on the basis of sufficiency of evidence. In *Lavender v. Kurn*, 327 U.S. 645, 66 Sup. Ct. 740

(1946), the United States Supreme Court noted the following:

> "The jury having made that inference, the Respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury." *Id.* 744.

In *Western & Atlantic Rail Road v. Hughes*, 278 U.S. 496, 49 Sup. Ct. 231 (1929), the United States Supreme Court noted as follows:

> "The evidence introduced by the Plaintiff was substantial; and was sufficient if believed to sustain a verdict in her favor. There was much conflict in the evidence . . . But the credibility of the witnesses and the weight of the evidence was obviously matters for the jury." *Id.* 231.

In the case of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 Sup. Ct. 2505 (1986), the United States Supreme Court noted as follows:

> "Credibility determinations, the weighing of evidence and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a Motion for Summary Judgment or a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable

inferences are to be drawn in his favor." *Id.* 2514.

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 Sup. Ct. 2097 (2000), the Supreme Court reiterated the same standard.

This standard of review has been in place for many years. Yet, the standard of review for sufficiency of evidence was violated by the United States Court of Appeals for the Third Circuit in its opinions (see Appendix B). The Court repeatedly rejected the jury findings of fact and logical inferences and repeatedly drew additional inferences and facts favorable to the Respondents who were not the verdict winners. The standard of review was totally ignored and violated. The reversal was egregious since it was contrary to established court decisions. A fair reading of the trial record demonstrates substantial evidence in favor of the Petitioners' case.

The Statement of the Case section of this Writ is incorporated by reference and will not be repeated. The Statement of the Case summarizes the pertinent evidence.

Clearly, a review of the trial demonstrates ample evidence utilizing the above standard of review, by which a jury could clearly find sufficient evidence to support the verdict in favor of Mr. McLaughlin and Mr. Micewski.

The Respondents alleged that Mr. McLaughlin and Mr. Micewski were not able to testify in court

supposedly because of decisions by the United States Attorney and the District Attorney of Philadelphia. But, Mr. McLaughlin and Mr. Micewski stated they were repeatedly called as witnesses in the Philadelphia Courts and Federal Courts during the years 1997, 1998, 1999 and 2000 (2/3 N.T. 114, A-75, 2/6 N.T. 92, 93, A-196, A-197). Both Mr. McLaughlin and Mr. Micewski were offered a permanent transfer to Norristown during the October 6, 1997 meeting. The union declined that offer. A new letter was sent on October 14, 1997 reiterating that offering a temporary transfer to Norristown. Mr. Micewski indicated he was never given an opportunity to respond to that particular offer prior to his sudden and unexpected transfer to Wilkes Barre (A-198).

The evidence demonstrates on October 14, 1997, the first civil rights lawsuit of the Petitioners was filed (A-361). Although the Respondents claim they were uncertain when they received it, the testimony of Donald Bailey clearly indicated that the lawsuit was served on October 14th on the receptionist for Mr. Fisher (2/7 N.T. 66-69, A-266, A-267). Mr. Fisher also testified the lawsuit was timely received (2/5 N.T. 222-224, A-150). The Respondents initiated an immediate investigation where McLaughlin and Micewski were forced to testify. The Respondents were particularly upset since the Noonan Report was attached to the Petitioners' Complaint.

Letters were sent on November 5th of 1997 and November 12th of 1997 to both Petitioners transferring Mr. McLaughlin to Greensburg and Mr.

Micewski to Wilkes Barre. What was most telling was that every Respondent was asked if there were any notes or discussions, etc., about the reasons for the transfers prior to the lawsuit or after the lawsuit was filed. All the Respondents stated there were no notes and no discussions. When Mr. McLaughlin and Mr. Micewski went to their respective transfers in Wilkes Barre and Greensburg, there was no work for them to do for many months. Neither Petitioner was expected by the Supervisor in the offices they were assigned to.

The evidence further demonstrates that Mr. McLaughlin was having serious physical problems and pain due to a back injury that was job related where he was treating regularly with doctors in Philadelphia. His father had a massive heart attack on November 16, 1997. The Respondents ordered Mr. McLaughlin to go to Greensburg indicating if he stayed with his father or stayed for needed medical treatment, he would be terminated.

Critical testimony was given by Mr. McGinnis, the Supervisor for Mr. McLaughlin and Mr. Micewski. Mr. McGinnis provided strong testimony of the retaliatory conduct by the Respondents. He stated the Respondents told him to treat Mr. McLaughlin and Mr. Micewski differently (2/5 N.T. 45, A-106). He repeatedly asked why Mr. Micewski and Mr. McLaughlin were being treated differently and never was given an answer (2/5 N.T. 46, 47, A-106). Mr. McGinnis confirmed the emotional and physical distress of the both the Appellees, particularly the

depression suffered by Mr. Micewski (2/5 N.T. 55-57, A-108, A-109).

Further proof of the retaliation was the false testimony of Attorney General Fisher. Mr. Stiles, the former United States Attorney, testified he ultimately had no objection to Mr. Micewski and Mr. McLaughlin continuing to stay at the Essington Avenue location in Philadelphia. Mr. Fisher emphatically denied Mr. Stiles testimony and testified Mr. Stiles objected to the Petitioners being at the Essington Avenue location (2/5 N.T. 79, 80, A-114). This contradiction by Mr. Fisher (2/5 N.T. 217, 218, A-149) further supported and evidenced the Petitioners' claim for retaliation since Mr. Stiles was not objecting to the Petitioners' presence.

The testimony of Mr. Pappert, particularly in reference to the June 10, 1997 memo (A-353), and the lack of any planning or reason behind the transfers, was fully before the jury (2/5 N.T. 167, 168, 170, 171, 184-189, 199, A-136, A-137, A-140 – A-142, A-144).

Not one Respondent could explain why, after the lawsuit was filed, there had been no previous plans to move the Petitioners to Wilkes Barre or Greensburg. There was no evidence of systematic planning, no memos, etc. Instead, the transfer was a retaliatory act as evidenced by the complete lack of work and surprise of the supervisors in the new offices in Wilkes Barre and Greensburg when Mr. Micewski and Mr. McLaughlin arrived (2/3 N.T. 111-113, A-74, 2/6 N.T. 111-114, A-207).

There clearly was an unusual fact pattern after the filing of the lawsuit. The evidentiary record was not just the timing of the lawsuit and the transfers. This is a case where there was quite a bit more; no planning, no one was told about the transfer, the supervisor, Mr. McGinnis, was not given any reasonable explanation, and the Attorney General contradicted Mr. Stiles about reasons why the Petitioners could not work out of the Essington Avenue office.

The case of *Farrell v. Planter's Lifesavers Co.*, 206 F.3d 271, 281 (3rd Cir. 2000) noted that timing a lawsuit can be augmented by demonstrating other types of circumstantial evidence.

> "Although timing and ongoing antagonism have often been the basis for the casual link, our case law clearly has allowed a plaintiff to substantiate a casual connection for purposes of the prima facie case through other types of circumstantial evidence that supports the inference. For example, a plaintiff may establish the connection by showing that the employer gave inconsistent reasons for terminating the employee." *Id.* 280, 281.

Clearly the evidence and all inferences support the jury's verdict. There were grievous errors in the standard of review used by the United States Court of Appeals for the Third Circuit in its Opinion, which is marked as Appendix B. Unfortunately, the Opinion credited defense evidence and gave the inference to the Respondents as opposed to giving the inferences to the verdict winners, the Petitioners. The factual

findings and resolutions of the jury were ignored by the Third Circuit, which instead viewed the evidence favorable to the Respondents. A review of some of the mistakes in the Third Circuit's Opinion (Appendix B), is now necessary.

The United States Court of Appeals, in its Opinion, failed to adequately discuss the totality of the evidence as will be seen.

The first error of the panel involved whether Mr. McLaughlin and Mr. Micewski were able to testify in Court.

The Respondents alleged that Mr. McLaughlin and Mr. Micewski were not allowed by the Philadelphia District Attorney to testify in court. But, Mr. McLaughlin and Mr. Micewski stated they were repeatedly called as witnesses and did testify to negate this accusation (A-75, A-196, A-197). The jury resolved this dispute in their favor. The Opinion (Appendix B) then unfairly attempted to distinguish between older and newer cases (Appendix B, page 28). But that was not the issue. The jury clearly concluded the Petitioners were continuing to testify. The Third Circuit now has attempted to draw some negative inference against the Petitioners on the new versus old distinction. This was unfair and contrary to a favorable evidence review for the verdict winners.

The evidence demonstrated Mr. McLaughlin and Mr. Micewski were offered a transfer to Norristown. The union, on their behalf, declined the offer. The

Respondents sent a second letter on October 14, 1997 reiterating the offer for a temporary transfer to Norristown. On that same day (October 14, 1997), the lawsuit was filed (A-39, A-60). Neither Mr. McLaughlin nor Mr. Micewski were given an opportunity to respond to the October 14, 1997 letter. Mr. Micewski testified he was never given an opportunity to respond, but instead was given a sudden and unexpected transfer to Wilkes Barre on November 5, 1997 (A-198).

The Third Circuit Court of Appeals first questioned whether the Respondents were aware of the lawsuit on October 14, 1997. There was clear evidence through the testimony of Attorney Bailey that Mr. Fisher's receptionist was served on October 14, 2007 (A-266, A-267). Mr. Fisher testified the lawsuit was timely received (A-150). The Respondents knew about the lawsuit as seen from reviewing the evidence most favorable to the Petitioners. But, the Third Circuit refused to do that and ignored the clear evidence in favor of the Petitioners.

Letters were sent on November 5, 1997 and November 12, 1997 to both Petitioners transferring Mr. McLaughlin to Greensburg and Mr. Micewski to Wilkes Barre (A-68). The transfer was the first time Mr. McLaughlin stated he heard he was being transferred to Greensburg, which was some 306 miles from his home (A-69). At the same time, Mr. McLaughlin was being treated for on-going back injuries and had written an extensive request for medical treatment in November of 1997 (A-70). Mr. McLaughlin submitted

these letters to the chain of command to remain for treatment, but the letters were ignored (A-71). Mr. McLaughlin's father suffered a heart attack on November 16, 1997 (A-70, A-71). Mr. McLaughlin had been ordered to go to Greensburg as part of this retaliatory transfer on November 17, 1997. He asked to remain to be with his father who was hospitalized with heart problems (A-70, A-71). Mr. McLaughlin was told by the various Respondents that he would be fired if he did not go to Greensburg, and he had to leave his father's side (A-71).

There was no evidence of any memo or evidence that the transfers to Greensburg and Wilkes Barre were ever discussed by the Respondents until the letters were sent on November 5, 1997.

Mr. McLaughlin described in detail his numerous back problems and the pain he was in when he went to Greensburg, as well as the lack of treatment (A-71, A-72). When Mr. McLaughlin arrived at Greensburg, he was given no work and was made to sit in a cubicle for eight hours a day doing nothing (A-74). When Mr. McLaughlin arrived at Greensburg, the supervisors at Greensburg didn't even know why he had been sent there (A-74). All of this was ignored by the Third Circuit panel, which tried to find reasons for this transfer by accepting rejected testimony by the jury (Appendix B, page 23, 24). The Third Circuit made an issue that the Petitioners had mentioned the suit before as negating testimony (Appendix B, page 29). But, the jury heard all the evidence which clearly pointed to the lawsuit as the trigger. Nothing else

could explain why the Petitioners were treated so badly. But, the Third Circuit wrongly gave the inferences to the Respondents instead of to the Petitioners.

Mr. Micewski stated when he was transferred to the Wilkes Barre office, the supervisors didn't even know he was coming or who he was. He was told to sit in a common area and find a place to stay (A-201, A-202). Mr. Micewski said he sat there for five months without any work to do (A-201). He testified as to how painful the transfer was because he couldn't be with his family during the weekdays (A-202).

The supervisor at the Attorney General's Office, Norman McGinnis, supported the testimony of Mr. McLaughlin and Mr. Micewski. He stated he did not know of any agents who had been put on temporary assignment as long as Mr. McLaughlin and Mr. Micewski (A-104). Mr. McGinnis indicated that when the assignments were suddenly made to transfer Mr. McLaughlin to Greensburg and Mr. Micewski to Wilkes Barre, there were no positions for them there (A-104). He stated that the Respondents told him to treat Mr. McLaughlin and Mr. Micewski differently than other men (A-104 – A-106).

The unfairness and failure to follow the established standard of review by the Third Circuit is seen in the panel's evaluation of Mr. McGinnis' testimony. This testimony was credited by the jury and should have been credited by the Third Circuit using the

proper standard of review. Yet, Mr. McGinnis' testimony was essentially downplayed by the Third Circuit in their Opinion. The Third Circuit drew its own conclusion on page 29 of Appendix B that the discriminatory treatment was because they couldn't testify. But, that wasn't the testimony of Mr. McGinnis, which the jury credited and the Third Circuit should have accepted if the proper standard of review was utilized.

Mr. McLaughlin gave strong testimony about how he was retaliated against when he requested medical treatment (A-69 – A-76). The Third Circuit improperly gave a defense inference stating as soon as he had the proper paperwork, he was given his medical treatment (Appendix B, page 25). This unfair conclusion totally ignored Mr. McLaughlin's testimony and instead credited the defense witnesses and versions, all of which were rejected by the jury.

Another example of the unfairness is the Third Circuit's finding about Mr. Micewski's statement he was never given an opportunity to respond to the October 14th Norristown offer. The Third Circuit said, "he admitted he never apprised the Office of the Attorney General of any willingness to accept the offer." (Appendix B, page 29). The Third Circuit, instead of giving the inference for the Petitioners that the lawsuit was the catalyst, gave the defense the inference that Mr. Micewski did not respond and therefore, lost the opportunity. That is not the way the inferences should flow if proper standard of review is utilized.

Mr. McGinnis' testimony noted how depressed Mr. Micewski was when he was ordered to go to Wilkes Barre. Mr. McGinnis was so concerned for Mr. Micewski's safety that he would travel with him (A-108, A-109). He also noted and confirmed the many physical problems that Mr. McLaughlin had for having to drive 300 miles twice a week (A-109). Mr. McGinnis testified that none of the Respondents would give him the common courtesy to explain why these men were being treated differently (A-109). The Third Circuit failed to properly credit or give any inferences to any of the testimony of Mr. McGinnis, Mr. McLaughlin and Mr. Micewski.

All of these strongly favorable inferences were ignored by the Third Circuit. The Third Circuit reached its own factual conclusion the transfers were because the Petitioners were not able to testify and thus transfers were legitimate. But, that was a decision the jury made against the Respondents. The Third Circuit, instead engaged in its own fact finding instead of accepting the jury's findings and the inference that flowed from the finding.

The Third Circuit totally ignored the evidence that there were discussions and a renewal of the temporary transfer offer on October 14th, the same day the lawsuit was filed. Suddenly, after that, on November 5th, transfers were made where there was no planning and no warning, when the Petitioners arrived at their faraway transfer locations, there was no work for them, and the supervisors were not advised of their coming. The jury credited all of this

as retaliation. The Third Circuit now reached a different conclusion unfairly and in violation of the standard of review.

The Third Circuit unfairly and wrongly crediting all inferences in favor of the Respondents and not the Petitioners, essentially re-decided the evidence. On pages 29 and 30 of Appendix B, the Third Circuit held the reason was there was no work for Mr. McLaughlin and Mr. Micewski was because the Office of the Attorney General was implementing new units, etc. (see Appendix B, pages 29, 30). But, that was not the testimony. The evidence that should be viewed favorably for the Petitioners is the testimony of Mr. McLaughlin, Mr. Micewski, and Mr. McGinnis. The Third Circuit overruled the jury and credited the Respondents' rejected testimony. That is not applying the correct standard of review.

One of the most egregious errors was the Third Circuit finding there was no factual dispute between Mr. Stiles and Mr. Fisher (see pages 24-26 of Appendix B). The jury clearly decided there had been a factual dispute between Mr. Stiles' and Mr. Fisher's testimony as did Judge Caputo. Mr. Stiles stated he advised Mr. Fisher that he had no objection to the Attorney General's Office remaining at the Essington Avenue location even if Mr. McLaughlin and Mr. Micewski were assigned there (A-114).

> "*Question*: And is it fair to say that you communicated with Mr. Fisher and his staff that ultimately

you could work with your agents at the Essington Avenue office even with the presence of my clients?

Answer: I think I said that. I didn't refer to Mr. McLaughlin and Mr. Micewski." (A-114).

Mr. Fisher testified it was not accurate that Mr. Stiles would not object if Mr. McLaughlin and Mr. Micewski were still at the Essington properties (A-149).

"*Question*: Well, you remember a meeting with Mr. Stiles and then a subsequent agreement or acquiescence by him that he would not object to using the Essington Avenue office for the F.B.I. people even if my clients were there?

Answer: That's not accurate." (A-149).

Another question was . . .

"*Question*: Did Mr. Stiles in any way, you can use his language, only concur or not object to the Essington Avenue office having even periodically or permanently the presence of my clients?

Answer: No. He did not, he did not." (A-149).

The Third Circuit found there to be a misinterpretation on this conflict (Appendix B, pages 24-26). Although there was ambiguity, the jury found the dispute in favor of the Petitioners as did the trial judge and as did present counsel when he made the argument to the jury. That was a jury question. The jury made a decision, which should be accepted.

The Third Circuit's Opinion, particularly on pages 27-32, is essentially a re-determination of the evidence giving inferences to the defense and overturning jury decisions. But a fair crediting of the Petitioners' evidence provided substantial support for the verdict.

There was a clear factual basis in this trial record to support all the conclusions the jury reached in their verdict. The Third Circuit chose not to give any weight to those inferences and instead chose to give weight to discredited evidence that the jury already heard and decided against.

CONCLUSION

The Petitioners, John McLaughlin and Charles Micewski, by their counsel, Samuel C. Stretton, Esquire, respectfully request this Honorable Court grant this Writ of Certiorari and review the decision of the United States Court of Appeals for the Third Circuit. The Petitioners ask that this Honorable Court find the United States Court of Appeals for the Third Circuit erred in not utilizing the appropriate

standard of review for sufficiency of evidence. The Petitioners respectfully request this Honorable Court reverse the decision of the United States Court of Appeals for the Third Circuit and reinstate the jury verdict and monetary damages.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-4329

JOHN MCLAUGHLIN;
CHARLES A. MICEWSKI,

v.

MICHAEL FISHER; GERALD PAPPERT;
BRUCE SARTESCHI; DAVID KWAIT;
ROBERT VON SCIO; JAMES CAGGIANO

Gerald Pappert, Bruce Sarteschi,
David Kwait and James Caggiano,
Appellants

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 3:00-cv-00521)
District Judge: Honorable A. Richard Caputo

Argued December 20, 2007

Before: LOURIE*, Circuit Judge, RESTANI**, Judge, and OBERDORFER***, District Judge.

JUDGMENT

This case came to be heard on the record from the United States District Court of the Middle District of Pennsylvania and was argued before the Third Circuit on December 20, 2007.

After review and consideration of all contentions raised by the parties, it is hereby ORDERED AND ADJUDGED that the judgment by the District Court dated March 7, 2005 is REVERSED and judgment is GRANTED in favor of appellants. All of the above are in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk

DATED: May 5, 2008

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* Honorable Alan D. Lourie, Judge of the United States Court of Appeals for the Federal Circuit, sitting by designation.

** Honorable Jane A. Restani, Chief Judge of the United States Court of International Trade, sitting by designation.

*** Honorable Louis F. Oberdorfer, Senior Judge of the United States District Court for the District of Columbia, sitting by designation.

APPENDIX B

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-4329

JOHN MCLAUGHLIN;
CHARLES A. MICEWSKI,

v.

MICHAEL FISHER; GERALD PAPPERT;
BRUCE SARTESCHI; DAVID KWAIT;
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Before: LOURIE*, Circuit Judge, RESTANI**, Judge, and OBERDORFER***, District Judge.

(Filed: May 5, 2008)

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* Honorable Alan D. Lourie, Judge of the United States Court of Appeals for the Federal Circuit, sitting by designation.

** Honorable Jane A. Restani, Chief Judge of the United States Court of International Trade, sitting by designation.

*** Honorable Louis F. Oberdorfer, Senior Judge of the United States District Court for the District of Columbia, sitting by designation.

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OPINION OF THE COURT

RESTANI, Judge.

This matter arises from the transfers of appellees John McLaughlin and Charles Micewski (collectively "appellees"), employees of the Pennsylvania Office of the Attorney General ("OAG"), to what appellees perceive as undesirable "temporary" work locations. Appellants Gerald Pappert, David Kwait, James Caggiano, and Bruce Sarteschi (collectively "appellants") appeal from a judgment of the United States District Court for the Middle District of Pennsylvania that was entered, pursuant to a jury verdict, in favor of appellees.

Appellants were senior staff members of then-Pennsylvania Attorney General Michael Fisher and were involved in making the decision to transfer appellees.[1] The jury found that appellants improperly

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[1] Pappert was the First Deputy Attorney General; Kwait was the Chief of the Office of Criminal Investigations, Criminal Law Division; Caggiano was the Deputy Chief of the Bureau of Narcotics Investigation and Drug Control, Criminal Law

(Continued on following page)

transferred appellees in retaliation for filing a prior lawsuit against Fisher and other government officials. The District Court denied appellants' motion for judgment as a matter of law or, in the alternative, a new trial. The court held that a prior administrative determination by the Pennsylvania Labor Relations Board ("PLRB") did not preclude appellees from litigating whether appellants retaliated against them for filing the lawsuit, and that the evidence was sufficient for the jury to find retaliation. Although we decline to give preclusive effect to the PLRB's decision, we conclude that the evidence is insufficient to support the jury verdict. We will reverse the District Court's denial of the motion for judgment as a matter of law and grant judgment in favor of appellants.[2]

Division; and Sarteschi was the Director of Human Resources. Fisher is also a defendant in this action, but he does not appeal here. The District Court granted him a new trial, which is stayed pending this appeal. (App. 20 (*McLaughlin v. Fisher*, No. 3:00-cv-00521 (Order Granting Defs.' Mot. to Certify Final J. & to Stay Trial of Claims Relating to Fisher, June 27, 2005)).) Since conclusion of the trial before the District Court, Fisher has become the Honorable Michael Fisher, Judge of the Court of Appeals for the Third Circuit. Accordingly, no permanent member of the Court of Appeals for the Third Circuit takes part in the consideration of this matter.

[2] Although appellants also appeal the denial of their motion for a new trial, we need not address the related arguments in light of our holding. Nonetheless, we note that prior to trial, the District Court ruled irrelevant an internal investigative report prepared for the OAG. Throughout the trial, appellees' counsel indicated that the report either exonerated his clients of misconduct or, at least, found insufficient evidence of misconduct to

(Continued on following page)

BACKGROUND

The following facts are established in the record. Appellees retired from the Philadelphia Police Department and joined the Philadelphia office of the OAG's Bureau of Narcotics Investigation Unit ("BNI") in 1995. As narcotics agents, appellees investigated cases involving the sale and distribution of narcotics in and around Philadelphia. Their responsibilities involved collecting evidence, preparing criminal complaints and warrants, and appearing in court as witnesses for the prosecution. The United States Attorney's Office for the Eastern District of Pennsylvania ("USAO") and the Philadelphia District Attorney's Office ("DA") prosecute the majority of the cases that Philadelphia narcotics agents present.

In 1996, the USAO and DA called into question the credibility of five Philadelphia BNI agents, including appellees, alleging that the agents knowingly gave false testimony and provided false statements about drug seizures and arrests. The prosecuting offices dismissed a number of criminal cases and requested release of a number of convicted felons as a result of the allegedly false testimony and statements. Both offices refused to prosecute any new cases in which appellees were involved. After an internal investigation, the OAG determined that it

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terminate them. Appellants' counsel consistently objected. We need not address whether this or any other trial conduct would warrant a new trial.

did not have sufficient grounds to terminate appellees, whose employment was governed by a collective bargaining agreement ("CBA"). In May 1996, then-Pennsylvania Attorney General Tom Corbett removed appellees from active investigations, thereby limiting the job functions they could perform.

When Fisher became Pennsylvania Attorney General in January 1997, appellees' situation remained the same. In April 1997, seeking to restore a working relationship with the USAO and DA, and to find productive work for appellees, Fisher and certain senior staff members met with the prosecuting offices to discuss appellees' situation. The offices reaffirmed their positions as to their unwillingness to prosecute cases in which appellees were involved. Concluding that appellees could no longer function as productive narcotics agents, the OAG began exploring options available under the CBA to place them in productive positions. The CBA protected appellees from unilateral permanent transfers to other regional offices, but not temporary transfers. Appellants engaged in ongoing discussions through the Summer of 1997 to come up with a solution.

Meanwhile, Fisher's administration was also taking measures to strengthen the OAG's Regulatory Compliance and Intelligence Unit ("Intelligence Unit"), which enforced the Criminal History Record Information Act ("CHRIA") and the Child Protective Services Act. The administration budgeted ten CHRIA agent positions throughout the State to enforce the acts, and aimed to have at least one

CHRIA agent in each of the OAG's eight regional offices. CHRIA agents audit state criminal history records, which does not require testifying in court.

On October 6, 1997, Kwait, Sarteschi, and non-defendant William Ryan, Director of the OAG's Criminal Law Division, met with appellees and representatives of appellees' union, the American Federation of State, County, and Municipal Employees, Council 13 ("AFSCME"), to discuss the need for changes in appellees' duties and the need to transfer them to other regions. Ryan offered appellees the option of accepting voluntary permanent transfers to the Intelligence Unit in the Norristown regional office to perform CHRIA work. Appellees, exercising their rights under the CBA, declined the offer.

By letter dated October 8, 1997, the AFSCME requested that the OAG consider assigning appellees to other nearby counties to perform narcotics work as agents from the Philadelphia office. (App. 403-04.) By letter dated October 14, 1997, the OAG denied the request and kept open the initial offers. (App. 405-06.) That same day, October 14, 1997, appellees and two other similarly situated agents commenced a lawsuit, entitled *McLaughlin v. Watson*, No. 1:97-cv-01555 (M.D. Pa. filed Oct. 14, 1997) ("Watson Lawsuit"), against Fisher, Corbett, and other government officials.[3] The lawsuit alleged that the defendants in

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[3] The other parties were the Assistant Secretary of State for the U.S. State Department; agents of the CIA; then-United

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that case impeded the agents' law enforcement efforts and destroyed their careers as a result of a conspiracy to protect a Dominican Republic drug organization with ties to a Dominican political party.

By letters dated November 5, 1997, appellants reassigned McLaughlin and Micewski to the Intelligence Unit, (App. 407, 409), and by letters dated November 12, 1997, temporarily transferred them to the Greensburg and Wilkes-Barre regional offices, respectively, due to "operational requirements," (App. 408, 411). Greensburg was approximately 300 miles from McLaughlin's residence, and Wilkes-Barre was approximately 100 miles from Micewski's residence.[4]

On November 26, 1997, the AFSCME filed an unfair practice charge with the PLRB, alleging that the OAG violated sections 1201(a)(1) and (3) of the Pennsylvania Public Employee Relations Act ("PERA"), 43 Pa. Stat. Ann. § 1101.1201(a)(1), (3) (West 2007), by

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States Attorney for the Eastern District of Pennsylvania, Michael Stiles; members of the FBI Task Force; other senior staff members of the OAG; the First Assistant District Attorney of Philadelphia; and certain Dominican Republican nationals. The District Court dismissed the OAG from that action in March 2002. (Watson Lawsuit (Order Granting Mot. Summ. J. & Removing from Case, Mar. 1, 2005).)

[4] During their placement in those regions, appellees stayed at hotels during the weekdays, at the OAG's expense, and returned home on the weekends. McLaughlin spent full days on Mondays and Fridays traveling, and Micewski, on Monday mornings and Friday evenings. The OAG provided State vehicles to both appellees.

transferring appellees to Greensburg and Wilkes-Barre in retaliation for exercising their rights under the CBA to reject the Norristown offer. (App. 304-07.) The AFSCME also filed a separate charge on behalf of McLaughlin, alleging that the OAG subjected him to additional retaliation.[5] (App. 312-16.) The PLRB issued a complaint, and a hearing examiner conducted a hearing on both charges on September 30, 1998. On October 2, 1998, appellees commenced this action pursuant to 42 U.S.C. § 1983, alleging that appellants transferred them in retaliation for filing the Watson Lawsuit.

In May 1999, the hearing examiner dismissed both unfair practice charges and rescinded the complaints. (App. 320-27 (*AFSCME, Council 13 v. Pennsylvania,* Nos. PERA-C-97-642-E/PERA-C-97-643-E (Proposed Decision and Order, May 26, 1999) ("PDO")).) The hearing examiner concluded that appellants did not transfer appellees to Greensburg and Wilkes-Barre in retaliation for exercising their rights under the CBA, and that the record was devoid of any inference of anti-union animus. (*Id.* at 325.) The hearing examiner, rather, determined that

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[5] The charge alleged that the OAG improperly denied McLaughlin's requests for sick leave and supplemental employment. The hearing examiner dismissed the charge, and the PLRB upheld the decision. (App. 326 (*AFSCME, Council 13 v. Pennsylvania,* Nos. PERA-C-97-642-E/PERA-C-97-643-E (Proposed Decision and Order, May 26, 1999)); App. 331 (*AFSCME, Council 13 v. Pennsylvania,* Nos. PERA-C-97-642-E/PERA-C-97-643-E (Final Order, Oct. 19, 1999)).)

appellees had a legitimate business reason for the transfers:

> Mr. Ryan's testimony as to the reason [the OAG] transferred the agents to Wilkes-Barre and Greensburg after they refused the permanent transfer to Norristown, is fully credited. Mr. Ryan is clear and concise when he explains that the first goal of the OAG was to have the problem permanently resolved. In doing so, the OAG attempted to be as fair as possible to the agents, offering them positions that were believed to be convenient to them, although lacking in efficiency to the agency. When the agents declined the offer, and a permanent solution was no longer possible, it opted to temporarily transfer the agents to locations where a need was perceived, instead of temporarily transferring them to Norristown, where no real need existed. As such, it is concluded that a legitimate business reason was the motivating factor in the transfers.

(*Id.* at 326.) The AFSCME filed exceptions to the PDO.

The PLRB dismissed the exceptions and made the PDO final. (App. 331 (*AFSCME, Council 13 v. Pennsylvania,* Nos. PERA-C-97-642-E/PERA-C-97-643-E (Final Order, Oct. 19, 1999) ("Final Order")).) The PLRB concluded that the record was devoid of any evidence of anti-union animus, and upheld the hearing examiner's finding that appellants temporarily transferred appellees to Greensburg and

Wilkes-Barre for a legitimate business reason. (*Id.* at 330-31.)

In February 2002, appellants moved for summary judgment in the present action, arguing that the PLRB's decision precluded relitigation of whether they acted for a legitimate, non-retaliatory reason. (Defs.' Br. in Supp. of Mot. for Summ. J. ("Defs.' Summ. J. Br.") 8-9.) The District Court rejected the argument, concluding that the issue the PLRB decided was not the same as the issue in the present action. (App. 43 (Mem., May 20, 2002 ("Summ. J. Mem.")).) The court stated that the PLRB's finding of a legitimate business reason for the transfers was "not preclusive as the PLRB did not consider . . . the filing of the federal lawsuit . . . in reaching its determination." (*Id.* at 43-44.) Appellants also argued that appellees' only evidence of retaliation, temporal proximity between the filing of the Watson Lawsuit and the transfers, was insufficient to support a claim for retaliation. (Defs.' Summ. J. Br. 7.) The District Court disagreed and submitted the case to the jury. (App. 44 (Summ. J. Mem.).)

After a trial, the jury rendered a verdict in favor of appellees and awarded them a total of $1.5 million in compensatory and punitive damages. Appellants moved for judgment as a matter of law or, in the alternative, a new trial. Appellants again contended that the PLRB's decision precluded relitigation of the reason for the transfers, and that appellees presented no evidence to permit the jury to find retaliation. (Br. in Supp. of Defs.' Mot. for J. as a Matter of Law or, in

the Alt., for a New Trial ("Defs.' JMOL Br.") 8-18, 31-43.)

The District Court, based on its prior summary judgment decision, held that preclusion did not apply because the issue that the PLRB decided was not the same as the issue in the present action. (App. 21 (Mem., Mar. 7, 2005 ("JMOL Mem.")).) The District Court reasoned that the issue at the PLRB was whether the OAG had committed an unfair labor practice under PERA, and that the PLRB's factual finding was that the transfers were not motivated by anti-union animus. (*Id.* at 27.) The court continued that the PLRB did not address whether appellants' business reason for the transfers was pretext for retaliation for filing the Watson Lawsuit, or whether appellants would have transferred appellees absent the filing of the lawsuit. (*Id.* at 27-28.) The court also held that evidence of temporal proximity between the filing of the lawsuit and the transfers, in combination with a conflict between the testimony of U.S. Attorney Michael Stiles[6] and Fisher, permitted the jury to find retaliation. (*Id.* at 28-29.) Appellants appeal.

JURISDICTION & STANDARD OF REVIEW

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. We have jurisdiction under 28 U.S.C. § 1291. We exercise plenary review of the

[6] Stiles was the U.S. Attorney for the Eastern District of Pennsylvania at the time of the events.

District Court's non-application of issue preclusion. *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 248 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 1878 (2007). We also exercise plenary review of the District Court's denial of a motion for judgment as a matter of law. *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir. 1993) (citing *Wittekamp v. Gulf & Western Inc.*, 991 F.2d 1137, 1141 (3d Cir. 1993)). A motion for judgment as a matter of law "should be granted only if, viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability." *Id.* "'The question is not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury could properly find a verdict for that party.'" *Id.* (quoting *Patzig v. O'Neil*, 577 F.2d 841, 846 (3d Cir. 1978)).

DISCUSSION

I. ISSUE PRECLUSION

Appellants argue that the District Court erred in holding that the PLRB's decision did not preclude appellees from relitigating the motivation for the transfers. Appellants claim that the PLRB's decision preclusively established that they transferred appellees for a legitimate business reason and therefore bars appellees from now arguing that they were transferred in retaliation for filing a lawsuit.

A. General Principles

The doctrine of issue preclusion, also known as collateral estoppel, bars relitigation of issues that have been adjudicated in a prior action. *Allen v. McCurry,* 449 U.S. 90, 94 (1980); *Edmundson v. Borough of Kennett Square,* 4 F.3d 186, 189 (3d Cir. 1993). Issue preclusion bars re-examination of an issue even in suits on different causes of action. *Allen,* 449 U.S. at 94.

Under principles of issue preclusion, "once an *issue* is raised and determined, it is the entire *issue* that is precluded, not just the particular arguments raised in support of it in the first case." *Yamaha Corp. of Am. v. United States,* 961 F.2d 245, 254 (D.C. Cir. 1992) (citing *Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Reserve Sys.,* 900 F.2d 360, 364 (D.C. Cir. 1990) and Restatement (Second) of Judgments § 27 cmt. c (1982)). Issue preclusion may foreclose relitigation of an issue "of evidentiary fact, of 'ultimate fact' (i.e., the application of law to fact), or of law." Restatement (Second) of Judgments § 27 cmt. c. Thus, "if the party against whom preclusion is sought did in fact litigate an issue of ultimate fact and suffered an adverse determination, new evidentiary facts may not be brought forward to obtain a different determination of that ultimate fact." *Id.*; *see also Peloro v. United States,* 488 F.3d 163, 175-76 n.12 (3d Cir. 2005) (concluding that issues decided by Bankruptcy Court pertaining to certain certificated securities are "broad enough to preclude relitigation of the issue as to all of the certificated securities") (citing

Restatement (Second) of Judgments § 27 cmt. c); *Sec. Indus. Ass'n,* 900 F.2d at 364 (issue preclusion "results from the resolution of a question *in issue,* not from the litigation of specific *arguments* directed to the issue"); *Cory v. Comm'r of Internal Revenue,* 159 F.2d 391, 392 (3d Cir. 1947) ("[T]he parties are not entitled to have a question considered on its merits a second time merely because they failed to produce all the facts the first time."); 18 *Moore's Federal Practice,* § 132.02[2][d], at 132-26 (Matthew Bender 3d ed. 2006) ("A party therefore cannot avoid issue preclusion simply by offering evidence in the second proceeding that could have been admitted, but was not, in the first, but rather bears the consequences of inadequate litigation by waiving the right to do so in a subsequent case."); 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4417, at 431 (2d ed. 2002) ("The minimum reach of issue preclusion beyond precise repetition of the first action is to prevent relitigation by mere introduction of cumulative evidence bearing on a simple historic fact that has once been decided.").

Under 28 U.S.C. § 1738,[7] federal courts must give state court judgments the same preclusive effect as would the courts of the rendering state. *Migra v.*

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[7] 28 U.S.C. § 1738 provides that "[t]he . . . judicial proceedings of any court of any such State . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State. . . ." 28 U.S.C. § 1738 (2000).

Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81 (1984). Under § 1738, federal courts must also give state administrative decisions that have been reviewed by a state court preclusive effect. *See Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 466-67 (1982) (holding that state court judgment affirming employment discrimination determination by state administrative agency precluded relitigation of issue in federal action). Although § 1738 does not apply to unreviewed state administrative decisions, under federal common-law principles of preclusion, in § 1983 cases, "when a state agency 'acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate,' . . . federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts." *Univ. of Tenn. v. Elliott,* 478 U.S. 788, 799 (1986) (quoting *United States v. Utah Constr. & Mining Co.,* 384 U.S. 394, 422 (1966)); *see also Edmundson,* 4 F.3d at 189 ("[I]n section 1983 cases, only state administrative factfinding is entitled to preclusive effect in the federal courts when the agency ruling remains unreviewed by state courts."). Thus, we apply Pennsylvania law to determine whether to accord preclusive effect to the PLRB's factual findings. *See Greenleaf v. Garlock, Inc.,* 174 F.3d 352, 357 (3d Cir. 1999).

In Pennsylvania, issue preclusion applies when four conditions are met: (1) the issue determined in the prior action is identical to the one in a subsequent

action, (2) the previous judgment is final on the merits, (3) the party against whom the defense is invoked is identical to or in privity with the party in the first action, and (4) the party against whom preclusion is sought had a full and fair opportunity to litigate the issue in the prior action. *Dici v. Commonwealth of Pa.*, 91 F.3d 542, 548 (3d Cir. 1996) (citing *Shaffer v. Smith*, 673 A.2d 872, 874 (Pa. 1996) and *Safeguard Mut. Ins. Co. v. Williams*, 345 A.2d 664, 668 (Pa. 1975)). The Pennsylvania Supreme Court has not addressed whether issue preclusion applies to unreviewed factual findings of the PLRB, but other courts have concluded that it does, *see Stokes v. Bd. of Trs. of Temple Univ.*, 683 F. Supp. 498, 500 (E.D. Pa. 1988) (citing *Balsbaugh v. Zeck*, 500 A.2d 208 (Pa. Commw. Ct 1985)), *aff'd*, 872 F.2d 413 (3d Cir. 1989), and we have no reason to conclude that Pennsylvania law would take a different course.

B. Identity of Issue

In determining whether issue preclusion applies, we must first determine the issue presented before the PLRB. At the PLRB proceedings, appellees had to prove that (1) they engaged in protected activity, (2) the OAG knew of the protected activity, and (3) the OAG was motivated by anti-union animus in transferring them. (*See* App. 324 (PDO); App. 330 (Final Order).) As the first two elements were not disputed, disposition of the proceedings depended on whether appellees satisfied the third element. (*See* App. 325 (PDO); App. 330 (Final Order).) To establish the third

element, appellees provided testimony to show that appellants transferred them in retaliation for exercising their rights under the CBA. (*See* PLRB Hr'g Tr. 61:1-149:4, Sept. 30, 1998 (available at Defs.' Reply Br. in Supp. of Mot. for Summ. J., Ex. B & C).) In response, the OAG offered testimony to show that they transferred appellees for a legitimate, non-retaliatory reason. (*See* App. 325 (PDO); Defs.' Summ. J. Br. 9.) Based on the arguments, the critical issue litigated before the PLRB was the reason for the transfers. Appellants argue that because this issue is part and parcel of both the PLRB proceedings and the present action, appellees may not relitigate it here.

In the present action, appellees' sole argument is that appellants transferred them in retaliation for filing the Watson Lawsuit. A review of the record does not show that, before the PLRB, they argued this was a possible reason for the transfers.[8] In fact, appellees stated during oral argument that they attempted to raise a free speech retaliation claim but that the PLRB precluded them from doing so. Nothing in the record supports this assertion, but appellants agreed

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[8] Although McLaughlin had stated during the hearing that he believed a reason for the alleged retaliation was that "between the time that we refused a permanent transfer to Norristown our attorney had to file a lawsuit in the Middle District and that was before we got transferred," (PLRB Hr'g Tr. 128:12-16), the record does not show submission of any relevant evidence developing this point. We do not have a complete record of the PLRB proceedings, and there are no affidavits addressing what did or did not occur as to this issue.

throughout the proceedings at the District Court that constitutional claims may not be raised before the PLRB.[9] (*See* Defs.' Summ. J. Br. 8 n.4; App. 284 (Defs.' Closing Argument, Trial Tr. 140:4-21, Feb. 7, 2003).) With this in mind, we turn to a comparison of what is at issue in the case before us and what actually was decided by the PLRB.

To establish a First Amendment retaliation claim under § 1983 against a public employer, a public employee must allege that he or she engaged in activity protected by the First Amendment, and "the protected activity was a substantial or motivating factor in the alleged retaliatory action." *Baldassare v. New Jersey,* 250 F.3d 188, 195 (3d Cir. 2001) (citing

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[9] This position was likely overbroad, as review of Pennsylvania law suggests that retaliation for filing a complaint challenging adverse changes in employment conditions may constitute an unfair labor practice under PERA. *See Fraternal Order of Police Lodge # 10 v. City of Allentown,* No. PF-C-93-131-E (PLRB May 30, 1995) (citing *Eastex, Inc. v. NLRB,* 437 U.S. 556, 565-66 (1978), wherein Supreme Court approved National Labor Relations Board's conclusion that resort to administrative and judicial forums in seeking to improve working conditions constitute protected activity under National Labor Relations Act ("NLRA")); *see also PLRB v. Loose,* 168 A.2d 323, 325 (Pa. 1961) ("[F]ederal decisions involving provisions of the [NLRA] may be looked to for guidance in interpreting similar provisions in the Pennsylvania statute."). The Watson Lawsuit charged certain government officials with conspiring with drug organizations to disrupt appellees' careers. Nonetheless, it is unnecessary to resolve here the question of whether an unfair labor practice charge based on retaliation for the lawsuit filing could have been pursued before the PLRB.

Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)). Once the employee establishes these two elements, the employer may rebut the employee's claim by demonstrating that the same adverse action would have taken place in the absence of the protected conduct. *Id.* (citing *Mt. Healthy,* 429 U.S. at 287). Here, the parties do not dispute that the filing of the Watson Lawsuit is protected activity. Resolution of the action therefore requires determination of whether the filing of the lawsuit was a substantial or motivating factor in appellants' decision to transfer appellees and, if so, whether appellants would have transferred appellees absent the filing of the lawsuit.

At the PLRB proceedings, appellees bore the burden of proving that anti-union animus motivated the transfers. Appellants claim that they responded to appellees' arguments by showing that they had a legitimate, non-retaliatory reason for the transfers. It is not entirely clear to what extent the PLRB was aware of the Watson Lawsuit. In its order, however, the PLRB did not discuss whether the filing of the lawsuit was considered in reaching its decision. The decision, rather, found that there was a legitimate business reason for the transfers, but it is not clear that the determination meant to exclude every other motive, nor is it clear how the PLRB as finder of fact would have treated mixed motives. Generally, this Court has not found issue preclusion where there was a lack of a clear determination on the facts underlying the constitutional claim or dramatically different

legal regimes were involved. *See, e.g., Edmundson,* 4 F.3d at 191 ("The Commission . . . did not consider, or even speculate about, whether plaintiff would have been discharged had he not violated the police manual by making public statements. Therefore, that proceeding does not give rise to issue preclusion. . . ."); *Bradley v. Pittsburgh Bd. of Educ.,* 913 F.2d 1064, 1075 (3d Cir. 1990) ("[T]he district court erred in holding that Bradley was precluded from raising his First Amendment claim. He must be given an opportunity to establish a prima facie case that his protected First Amendment activity was a substantial factor in his dismissal. If he succeeds, the burden will be on defendants to show that they would have terminated him in the absence of such protected conduct."); *Kelley v. TYK Refractories Co.,* 860 F.2d 1188, 1197 (3d Cir. 1988) ("[T]here are no facts in the referee's decision . . . relating to whether Kelley's departure from TYK occurred in a context of race discrimination in his employment. Nor can we infer such findings from the Board's legal conclusion. Pennsylvania's collateral estoppel doctrine does not permit us to find an issue has been adjudicated where each tribunal purportedly confronted with the issue has responded only with silence."); *Stokes,* 683 F. Supp. at 501 ("Although plaintiffs may have to establish pretext in order to prevail here, the context for that issue will be their specific claim of discrimination, not activity protected by the Pennsylvania Public Employe [sic] Relations Act."), *aff'd,* 872 F.2d 413.

These cases largely reflect the view of the Pennsylvania Supreme Court in *Odgers v. Unemployment Compensation Board of Review*, 525 A.2d 359 (Pa. 1987). There, the court held that even if factual issues are identical, issue preclusion would not apply if the actions under which the issue is raised have different underlying policies. *See id.* at 364; *see also Swineford v. Snyder County Pa.*, 15 F.3d 1258, 1267-68 (3d Cir. 1994) ("Under *Odgers*, reviewing courts must look beyond the superficial similarities between the two issues to the policies behind the two actions. . . . Only where the two actions promote similar policies will the two issues be identical for purposes of issue preclusion."). The Pennsylvania Supreme Court later explained the limitations of *Odgers* in *Rue v. K-Mart Corporation*, 713 A.2d 82 (Pa. 1998). The court held that an Unemployment Compensation Referee's factual findings precluded relitigation of an issue in a subsequent defamation suit, despite the different policies underlying the Unemployment Compensation Law and defamation, because the issue before the Referee was "an issue of pure fact." *Id.* at 85.[10] The court held that the differences between the public policies were irrelevant because "[a] fact is a fact, regardless of public policy." *Id.*

Here, however, it is not so easy to conclude that policy does not impact the determination that there

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[10] The factual issue indeed was easy to isolate from the legal and policy issues. It involved whether or not theft of food had occurred. *Id.*

was a legitimate business reason for the transfers.[11] Appellants have not demonstrated that the substantive and procedural framework for establishing causation under PERA is sufficiently similar to that which is applied in § 1983 decision-making so that we can say with confidence that the seemingly clear factual determination is not tainted by any underlying legal or policy differences in the two schemes. Thus, we agree with the District Court's conclusion

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[11] The public policy behind PERA is "to promote orderly and constructive relationships between all public employers and their employes [sic] subject, however, to the paramount right of the citizens of this Commonwealth to keep inviolate the guarantees for their health, safety and welfare." *Odgers,* 525 A.2d at 364 (quoting 43 Pa. Stat. Ann. § 1101.101). Thus, "PERA was enacted to accord public employees the right to organize and bargain with their employers, in the belief that establishing harmonious relationships between these parties would inure to the public benefit, in part through reduction in the number and duration of work stoppages." *Id.*

Section 1983 provides a right to a civil action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. The statute's purpose is to enforce the provisions of the Fourteenth Amendment by permitting an individual to sue for damages for violation of federal statutory or constitutional rights by a public official acting under state law. *Mitchum v. Foster,* 407 U.S. 225, 238-42 (1972). The framers of § 1983 intended that the statute provide a federal remedy for persons deprived of constitutional or federally guaranteed rights where there is no remedy under state law or where state law remedies are inadequate. *Allen,* 449 U.S. at 100-01 (citing *Monroe v. Pape,* 365 U.S. 167, 173-74 (1961)).

that this suit was not barred by the doctrine of issue preclusion.[12]

II. SUFFICIENCY OF THE EVIDENCE

Generally, a factual finding made by a jury is entitled to great deference, not subject to reversal unless no reasonable jury could make such a finding. *See Johnson v. Campbell,* 332 F.3d 199, 201-02 (3d Cir. 2003) (citing *Starceski v. Westinghouse Elec. Corp.,* 54 F.3d 1089, 1095 (3d Cir. 1995)). Here, however, as will be explained, no reasonable jury could conclude that the evidence supports a claim of First Amendment retaliation.

In their motion for judgment as a matter of law, appellants argued that appellees' evidence of temporal proximity between the filing of the Watson Lawsuit and the transfers was insufficient to support the jury's finding of retaliation. (Defs.' JMOL Br. 14-18.) The District Court, however, concluded that appellees submitted evidence beyond temporal proximity, specifically, evidence of a conflict between the testimony of Stiles and Fisher. (App. 28 (JMOL Mem.).) The court held that "[t]his difference in testimony, in combination with the close temporal proximity, allowed the jury to conclude as they did." (*Id.* at 29.)

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[12] We therefore find it unnecessary to explore the issues of whether appellees were parties or in privity with the AFSCME in the PLRB proceedings, or whether they had a full and fair opportunity to litigate in those proceedings.

The District Court also concluded that the "totality of the circumstances" supported a finding of causation. (*Id.*) The District Court erred.

A. Temporal Proximity is Not "Unusually Suggestive"

In proving a causal link between protected activity and adverse action, plaintiffs may rely on "a broad array of evidence." *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 284 (3d Cir. 2000). Evidence of timing between protected activity and adverse action, alone, ordinarily is insufficient to demonstrate a causal link unless the timing is "unusually suggestive" of retaliatory motive. *Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 503 (3d Cir. 1997) (citing *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1302 (3d Cir. 1997)). Where the temporal proximity is not so close as to be "unusually suggestive," courts may look to other types of circumstantial evidence that give rise to an inference of causation. *Farrell*, 206 F.3d at 280-81.

Here, the parties do not dispute that the transfers occurred on November 12, 1997, but they disagree as to when appellants became aware of the Watson Lawsuit. Appellees presented evidence showing that the complaint for the lawsuit was personally delivered to a receptionist at the OAG the same day it was filed, October 14, 1997. Although appellants testified that they were unsure as to when they received notice of the complaint, Fisher testified that he became aware of the complaint "[a]t least within

a couple of days of [October 14]." (App. 150 (Fisher Test., Trial Tr. 223:18-21, Feb. 5, 2003 ("Fisher Test.")).) Viewing this evidence in the light most favorable to appellees, we will assume that appellants became aware of the lawsuit shortly after October 14, 1997, and therefore a little less than one month passed between appellants' notice of the lawsuit and the transfers.

This Court has held that two days between a protected activity and an adverse action is "unusually suggestive" of retaliatory motive, *Krouse,* 126 F.3d at 503 (citing *Jalil v. Avdel Corp.,* 873 F.2d 701, 708 (3d Cir. 1989)), but that three months is not, *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n,* 503 F.3d 217, 233 (3d Cir. 2007). While this case obviously falls somewhere in between, the circumstances of the legitimate ongoing mission of finding positions for appellees places this matter nearer to the latter. Moreover, "it is causation, not temporal proximity itself, that is an element of [a] plaintiff's prima facie case, and temporal proximity merely provides an evidentiary basis from which an inference can be drawn." *Kachmar v. SunGard Data Sys., Inc.,* 109 F.3d 173, 178 (3d Cir. 1997). Determining whether temporal proximity alone may create an inference of retaliation is "essentially fact-based . . . depending . . . on how proximate the events actually were, and the context in which the issue came before us." *Farrell,* 206 F.3d at 279. Challenge to the sufficiency of the evidence supporting a verdict of retaliation will involve consideration

of the sufficiency of the evidence as a whole. *Woodson v. Scott Paper Co.*, 109 F.3d 913, 921 (3d Cir. 1997).

Even if the temporal proximity of less than one month ordinarily would be suggestive of a causal link, it cannot support an inference of retaliation in this case because the evidence here negates such an inference. First, the transfers took place in the midst of an ongoing process aimed at finding a place to which appellees could be transferred permanently. Second, McLaughlin's testimony that he had told Sarteschi "[o]n a continuing basis" since April 1996 of his intention to file a lawsuit, (App. 64 (McLaughlin Test., Trial Tr. 70:22-24, Feb. 3, 2003 ("McLaughlin Test."))), and appellees' admissions that they had made it generally known months before October 1997 that they intended to file the lawsuit, *Id.* (McLaughlin Test. 69:13-18); App. 199 (Micewski Test., Trial Tr. 102:17-103:6, Feb. 6, 2003 ("Micewski Test.")); *see also* App. 54 (Pls.' Opening Statement, Trial Tr. 31:4-5, Feb.3, 2003), undermine any suggestiveness of the timing here. These matters are explored further in Part II.C.

B. The Alleged Conflict in the Testimony of Stiles and Fisher is Insufficient to Create an Inference of Retaliation

Although the District Court likely incorrectly thought that the temporal proximity here "create[d] a strong inference [of retaliation] in and of itself," (App. 28 (JMOL Mem.)), the court buttressed its conclusion

of sufficient evidence by relying on a perceived difference in the testimony between Stiles and Fisher. Stiles' testimony concerned an August 1998 meeting, almost one year after the transfers, wherein Stiles and possibly Fisher discussed the FBI renting a space in the Philadelphia office located on Essington Avenue. According to the District Court, Stiles testified that, at the meeting, "he told [] Fisher that his federal agents could work at the same location as [p]laintiffs," and Fisher testified that "Stiles never told him [p]laintiffs could work in the same location as [the] federal agents." (*Id.* at 28, 29.) The District Court misinterpreted Stiles' testimony.[13]

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[13] Fisher's testimony was as follows:

Q. Well, did he – let's not stand on semantics. I want the crux of this.

Did Mr. Stiles, in any way, you can use his language, only concur or not object to the Essington Avenue office having, even periodically or permanently, the presence of my clients?

A. No.

Q. He did not?

A. He did not.

Q. He did not object to that?

A. He did not – no, he – Mr. Stiles was not willing – your statement is inaccurate. Your question is inaccurate the way you stated it.

Q. Let us cut to the chase. Are you telling us that Mr. Stiles never told you that he would be satisfied and could live with my clients being in the Essington Avenue office sometime in 1998, that is, August, September, October of 1998?

(Continued on following page)

First, a reading of the testimony shows that Stiles could not clearly recollect whether he had spoken to Ryan or Fisher. (*See* App. 114-15 (Stiles Test., Trial Tr. 80:1-6, 82:4-83:1, Feb. 5, 2003 ("Stiles Test.")).) Second, even if Stiles had spoken to Fisher, based on the testimony, a jury could not reasonably conclude that Stiles told Fisher that he approved of the FBI agents working in the same location as appellees.[14] Stiles' testimony, read as a whole, indicates that

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A. It's my recollection that it wasn't – Mr. Stiles was – Mr. Stiles had a lot of concerns involving cases that were handled by your clients and had concerns in working with our BNI office in Philadelphia, if your clients were involved in our operation in any way. That was my recollection. The issue of people moving into the office was really entirely different and separate from the issue that I think is before this Court.

(App. 149 (Fisher Test. 217:22-218:23).)

[14]. The relevant portion of Stiles' testimony was as follows:

Q. [T]here was a second meeting or conversation with [Fisher] where you said, after checking with FBI agents and others, you had no objection to my clients being present in Essington Avenue?

A. No. What I said was, after checking with the FBI and others, we had no objection to locating the task force in the Essington Avenue unit or building, notwithstanding the fact that one of the original Plaintiffs [not appellees], one of the BNI agents, was still assigned to Essington Avenue.

Q. And that position was made known to Mr. Fisher, am I correct?

A. Yes.

. . . .

(Continued on following page)

A. Well, I know it was made known at one of the regular meetings we had with members of the Attorney General's Office. I think Mr. Fisher was there and I told him directly, it might have been Mr. Ryan. But we did make that known to them and thereafter I believe they located the FBI agent there.

Q. And is it fair to say that you communicated with Mr. Fisher and his staff that ultimately you could work with your agents at the Essington Avenue Office even with the presence of my clients?

A. I think I just said that. I didn't refer to Mr. McLaughlin [or] Mr. Micewski. I knew at that time that another original Plaintiff was at the Essington Avenue Office and we said notwithstanding that, they had gone down to inspect the premises and they were willing to locate . . . the FBI unit down there.

(App. 114 (Stiles Test. 79:12-80:16).) The testimony continues:

Q. Would [the underlined portion of the deposition] refresh your recollection . . . that . . . you let the word out that you had no objection to the presence of these agents, to use the plural, in the Essington Avenue Office? Was that your testimony back then, and does that refresh your recollection?

. . . .

[A.] Well, the question that you've underlined is, and it was ultimately communicated to them that you could work with their presence.

And my answer was, correct.

Now, I haven't gone back to read all of the earlier question . . . , but . . . I know at the time that there was one original Plaintiff there.

. . . .

Q. That was Mr. McKeefery?

A. Agent McKeefery. And I think, frankly, there was a discussion, there was the possibility that your clients, . . . Agent McLaughlin or Agent Micewski,

(Continued on following page)

he accepted the presence of another agent in the Essington Avenue office, and reaffirms that he had reservations concerning appellees' presence, as others also testified.[15] In addition, as indicated, the 1998 meeting took place a year after the transfers at issue, and the location at that time of the state agents within a building utilized by federal agents has little to do with this action. At most, knowingly false testimony could be used to show a general improper

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> might be transferred back there at some point. I had originally had reservations about that when I met with [Fisher]. . . .
>
> . . . .
>
> And I expressed that. . . . I went back and talked to the FBI. I asked the FBI, does [*sic*] the investigating, go down, look at the premises. They went down. They said it was a separate unit, separate computers, separate entrances.
>
> I said, ultimately, this really isn't my call. It's your call, FBI. If you don't have an objection to it, that's fine. They said they could use the space down there. They could rent it. And I told that to the Attorney General.
>
> Q. To Mr. Fisher directly or to someone –
>
> A. I'm not positive. I can't remember whether it was Mr. Fisher directly or Mr. Ryan.

(*Id.* at 115 (Stiles Test. 81:4-83:1).)

[15] Indeed, Pappert and Kwait testified that Stiles had expressed concerns with appellees being in the same building as the FBI agents. (App. 167 (Pappert Test., Trial Tr. 289:2-5, Feb. 5, 2003 ("Pappert Test.")); App. 227-28 (Kwait Test., Trial Tr. 216:25-217:24, Feb. 6, 2003 ("Kwait Test.")).) Pappert also stated that Stiles did not object to and accepted the presence of another agent in the building. (App. 167 (Pappert Test. 289:6-15).)

intent on the part of non-appellant Fisher, but this testimony provides no such basis, even if it were relevant. Thus, the District Court erred in relying on the "difference" in the testimony in holding that the evidence was sufficient to support the jury verdict.

C. The Totality of the Circumstances

Nor could the evidence in the "totality of the circumstances" support the verdict. Appellees rely on an array of additional evidence to support their claim of retaliation. Appellants, however, have provided indisputable explanations to rebut most of the evidence, and the remainder is non-probative.

Appellees rely on evidence showing that they were still testifying as witnesses for the OAG from 1997 through 2000. The evidence, however, shows they were called to testify only in old cases and retrials. There is no evidence that they were testifying on new criminal cases. As to Micewski's testimony that appellants never gave him an opportunity to respond to the Norristown offer, he admitted that he never apprised the OAG of any willingness to accept the offer, (App. 211 (Micewski Test. 152:2-6)), and the record does not show that he ever objected to the PLRB's finding that he had rejected the offer. In response to McLaughlin's assertions that appellants' denial of his sick leave requests were retaliatory, appellants explained that they thought he was attempting to circumvent the transfer, as he made the claim as soon as he was reassigned and also defiantly

reported to the Philadelphia office. In any event, his request for leave was granted after he produced the documentation required for the type of leave he was seeking. (App. 148 (Pappert Test. 213:1-6); App. 185 (Sarteschi Test., Trial Tr. 48:6-15, Feb. 6, 2003).) Further, although an Intelligence Unit supervisor testified that appellants had instructed him to treat appellees differently, he also stated that the disparate treatment resulted from directives to only assign work to appellees that do not require them to testify, and directives to not assign them to do work in the Essington Avenue office. (App. 111 (McGinnis Test., Trial Tr. 68:11-20, Feb. 5, 2003 ("McGinnis Test.")).)

Although the District Court did not cite the following reasons as specifically supporting the verdict, appellees also rely on a lack of documentation concerning discussions or plans related to the transfers, and their own testimony that there was little work for five months at the Greensburg and Wilkes-Barre offices and that neither of the supervisors at those offices were expecting them. As evidence at trial indisputably established, however, the OAG was in the process of implementing plans to recreate the Intelligence Unit, and in such a situation, implementation is not instantaneous. The November 12, 1997, letters apprising appellees of their transfers state that "operational requirements" were the reasons for the transfers, (App. 408, 411), and appellees never rebutted the evidence that the Norristown office did not have any open positions designated for the revived unit. Further, consistent documentary and

testimonial evidence from persons in positions with knowledge established that there were open positions in Greensburg and Wilkes-Barre.[16] (*See* App. 147, 163 (Pappert Test. 210:14-212:4, 273:10-274:3); App. 221 (Kwait Test. 189:11-191:15); App. 254 (Ryan Test. 20:23-25); App. 412.) While no memos prior to October 1997 mentioning Greensburg or Wilkes-Barre in particular were uncovered, in July 1997, prior to the filing of the Watson Lawsuit, appellees had noted the option of transferring appellees and another agent to three different regions. (*See* App. 356.) In any case, assuming *arguendo* that any of the evidence as to conditions at Greensburg and Wilkes-Barre would contribute to a conclusion that there was an improper motive for the transfers, the evidence does not assist a juror in determining whether appellants transferred appellees as a result of a non-actionable motive to persuade appellees to accept permanent transfers or an actionable free speech retaliation motive. That is, no reasonable jury could have determined that a free speech retaliation motive for the transfers existed based on such evidence in the factual context of this case.

Not only is there insufficient evidence to support the verdict, there is significant evidence negating any actionable retaliatory motive. First, non-appellant

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[16] There was only hearsay testimony and speculation to the contrary. (*See* App. 104 (McGinnis Test. 38:25-39:11); App 201 (Micewski Test. 111:5-21); *see also* App. 166 (Pappert Test. 286:16-287:17).)

Fisher is the only common defendant in this action and the Watson Lawsuit, and he was merely one of numerous individuals sued there because of their professional positions. Although self-serving, appellants all testified that the Watson Lawsuit was part and parcel of grievances and suits to be expected and did not influence their decision to transfer appellees, and there is no evidence Fisher ever directed them to take any steps based on that action against him. Further undermining appellees' theory of free speech retaliation is their own testimony that they had made it generally known for more than a year prior to October 1997 that they intended to file a lawsuit. (*See* App. 64 (McLaughlin Test. 69:13-18); App. 199 (Micewski Test. 102:18-103:6).) Despite these admissions, appellees did not submit any evidence showing that retaliatory animus based on threats of a lawsuit existed during this period. Also problematic for appellees' argument is the fact that the pre-lawsuit compromise option of permanent employment at Norristown seemed to remain, and appellants have allowed McLaughlin to work in the Norristown office since April 1999 on a "temporary" basis. McLaughlin apparently reached an agreement with appellants whereby appellants reassigned him to the Norristown office on that basis, which obviously was not a cost advantage to the OAG. (*See* App. 76 (McLaughlin Test. 117:21-118:13).) Given the need to place appellees in some useful positions and all of the evidence, no reasonable jury could have found that the filing of the Watson Lawsuit motivated the transfers, as

opposed to a proper motive, or even a non-actionable improper motive.[17]

Rather, the evidence indicates that the filing of the long-anticipated lawsuit occurred in the midst of a necessary, ongoing effort to place appellees in productive positions, and at the same time that appellees rejected the only viable permanent solution that appellants had to their situation, a situation which appellants did not create and could not control, and which cannot be reasonably disputed.[18] That is, appellees could not function as narcotics agents because the local and federal prosecutors would not accept their cases, and appellees proposed only narcotics agent solutions.

CONCLUSION

Because we find that the evidence is insufficient to permit a reasonable jury to find that appellants

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[17] Whether or not a jury could have reasonably found that appellees were temporarily transferred in retaliation for rejecting the permanent Norristown offer, this issue is not before us, was not before the jury, and the PLRB has conclusively determined otherwise.

[18] We do not suggest that the filing of the Watson Lawsuit immediately after the compromise offer of permanent employment at Norristown was intended to solidify that offer as the floor for further negotiations. Nonetheless, the possibility of using such a tactic highlights the importance of ascertaining that any jury verdict of free speech retaliation in such a negotiation context be based on sufficient evidence and not mere speculation.

transferred appellees in retaliation for filing a lawsuit, we reverse the District Court's denial of appellants' motion for judgment as a matter of law and grant the motion in appellants' favor.

Judgment will enter accordingly.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN R. McLAUGHLIN and CHARLES MICEWSKI,	:	No. 3:00-CV-521 (Judge Caputo)
Plaintiffs,	:	
v.	:	
MICHAEL FISHER, GERALD PAPPERT, BRUCE SARTESCHI, DAVID KWAIT, and JAMES CAGGIANO,	:	
Defendants	:	

ORDER

(Filed Jun. 27, 2005)

NOW, this 27th day of June, 2005, upon consideration of Defendants' Motion to Certify Final Judgment Against Defendants Pappert, Sarteschi, Kwait and Caggiano pursuant to Fed. R. Civ. P. 54(b) and to Stay Trial of Claims Relating to Defendant Fisher, and any response thereto, IT IS HEREBY ORDERED that Defendants' Motion is GRANTED. The Court HEREBY FINDS that there is no just reason for delay of the moving Defendants' appeal. Accordingly, IT IS HEREBY ORDERED that final judgment is ENTERED as to Defendants Pappert, Sarteschi, Kwait and Caggiano pursuant to Fed. R. Civ. P. 54(b).

It is further ORDERED that the retrial of Defendant Fisher is STAYED pending the moving Defendants' appeal.

/s/ A. R. Caputo
A. Richard Caputo
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN R. McLAUGHLIN and CHARLES MICEWSKI,	:	
Plaintiffs,	:	
v.	:	CIVIL ACTION NO. 3:00-CV-521
MICHAEL FISHER, GERALD PAPPERT, BRUCE SARTESCHI, DAVID KWAIT, and JAMES CAGGIANO,	:	(JUDGE CAPUTO)
Defendants	:	

MEMORANDUM

(Filed Mar. 7, 2005)

Presently before the Court is Defendants' Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial. (Doc. 73.) I will not grant judgment as a matter of law because the issues decided by the Pennsylvania Labor Relations Board (hereinafter PLRB) were not the same as the issues in the present case and because Plaintiffs submitted evidence of temporal proximity and conflicting testimony between

Defendant Michael Fisher[1] and Michael Stiles,[2] then United States Attorney for the Eastern District of Pennsylvania, which permitted the jury to conclude that the protected activity was the cause of the retaliatory conduct. Plaintiffs will have twenty days to each remit the excessive $75,0000 of punitive damages awarded against Defendant Fisher or I will grant Defendant Fisher a new trial. I will not grant a new trial with regard to the other Defendants because the restrictions on Defendants' cross examination of Plaintiff Micewski were not improper, Defendants were not prejudiced by the restrictions in discussing the Noonan Report, and the awards for compensatory and punitive damages were otherwise not excessive.

BACKGROUND

Plaintiffs were investigators for the Pennsylvania Attorney General's Bureau of Narcotics Investigations and Drug Control (hereinafter BNI). Defendant Fisher served as the elected Attorney General of the Commonwealth of Pennsylvania. He first took office in January 1997. Defendant Gerald Pappert became the First Deputy Attorney General of the Commonwealth

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[1] Since the conclusion of the trial, it is the Honorable Michael Fisher, Judge of the Court of Appeals for the Third Circuit.

[2] Prior to his term as the United States Attorney, the Honorable Michael Stiles served as a Judge on the Pennsylvania Court of Common Pleas of Philadelphia.

of Pennsylvania at that same time, and Defendant David Kwait assumed the position of Chief of the Office of Criminal Investigations, Criminal Law Division, in the Office of the Attorney General (hereinafter OAG). Defendant James Caggiano served in the position of Deputy Chief of the BNI's Criminal Law Division beginning in June 1997. Defendant Bruce Sarteschi served as the Director of Human Resources for the OAG since 1980. From May through December 1997, Defendant Charles Warner served as Director of the OAG's Philadelphia office of the BNI.

On October 14, 1997, Plaintiff McLaughlin, Plaintiff Micewski, and Dennis McKeefery filed the action entitled *McLaughlin v. Watson,* No. 1:CV-97-1555 (M.D. Pa.). Plaintiffs alleged that the defendants in that case impeded their law enforcement efforts and destroyed their careers by engaging in a conspiracy to protect a Dominican Republic drug organization with ties to a Dominican political party. Defendant Fisher was among the named defendants in *Watson.* By mid-November of 1997, Plaintiff McLaughlin had been transferred to an office in Greensburg, Pennsylvania, and Plaintiff Micewski had been transferred to an office in Wilkes-Barre, Pennsylvania. Defendant Fisher, Defendant Pappert, Defendant Kwait, Defendant Caggiano, and Defendant Sarteschi were involved in the decision to transfer Plaintiffs.

Plaintiffs filed the present action alleging that the transfers were made in retaliation for the filing of

the first lawsuit. This action was transferred from the United States District Court for the Eastern District of Pennsylvania to the United States District Court for the Middle District of Pennsylvania on March 30, 2000. (Doc. 1.) I granted Defendants' motion for summary judgment regarding Plaintiff Dennis McKeefery and dismissed him from the action. (Doc. 17.) Thereafter, I denied Defendants' motion for summary judgment regarding the claims raised by Plaintiffs McLaughlin and Micewski. (Doc. 33.) During the jury trial, I granted Defendants' motion for judgment as a matter of law as to Defendant Warner, and I dismissed Defendant Warner from the case. The Defendants' motion for judgment as a matter of law was otherwise denied. (Doc. 55.) On February 7, 2003, the jury returned a verdict for Plaintiffs, awarding them a total of $1.5 million in compensatory and punitive damages. (Docs. 59-60.) The Clerk of the Court entered Judgment in favor of Plaintiffs and against Defendant Fisher, Defendant Pappert, Defendant Kwait, Defendant Caggiano, and Defendant Sarteschi on February 12, 2003. (Docs. 61-70.)

Defendants then filed Defendants' Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial on February 25, 2003. (Doc. 73.) They added an additional ground for judgment as a matter of law October 20, 2003, via the Amendment to Defendants' Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial. (Doc. 114.) The Philadelphia District Attorney's Office filed a brief in

support of Defendants' motion as *amicus curiae*. (Doc. 115.) Plaintiffs filed briefs in opposition to Defendants' motion and the *amicus* brief. (Docs. 125 and 126, respectively.) The parties also filed reply briefs. The matter is now ripe for disposition.

DISCUSSION

Defendants request two separate forms of relief from the Court. First, they renewed their motion for judgment as a matter of law pursuant to Rule 50(b). In support of their renewed motion, Defendants contend there are two grounds upon which they are entitled to relief: (1) the PLRB ruling precluded relitigation of the motivation for Plaintiffs' transfers; and (2) Plaintiffs presented no evidence to permit a reasonable jury to conclude the transfers were retaliatory.

As an alternative to judgment as a matter of law, Defendants also request that the Court grant a new trial. Defendants contend that: (1) the Court erred in restricting Defendants' cross examination of Plaintiff Micewski; (2) Plaintiffs' counsel's repeated mentions of the Noonan Report prejudiced the Defendants; (3) and the size of the award is against the weight of the evidence.

1) Judgment as a Matter of Law

Under Rule 50(b), a party may renew its request for a motion for judgment as a matter of law by filing

a motion no more than ten days after judgment is entered. Judgment notwithstanding the verdict should be granted sparingly. *See Walter v. Holiday Inns, Inc.*, 985 F.2d 1232, 1238 (3d Cir. 1993). In deciding whether to grant a Rule 50(b) motion:

> the trial court must view the evidence in the light most favorable to the non-moving party, and determine whether the record contains "the minimum quantum of evidence from which a jury might reasonably afford relief." The court may not weigh evidence, determine the credibility of witnesses or substitute its version of the facts for that of the jury. The court may, however, enter judgment notwithstanding the verdict if upon review of the record, it can be said as a matter of law that the verdict is not supported by legally sufficient evidence.

Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 691-92 (3d Cir. 1993) (citations omitted).

In the present case, Defendants contend there are two grounds upon which they are entitled to judgment as a matter of law: (1) the PLRB ruling precluded relitigation of the motivation for Plaintiffs' transfers; and (2) Plaintiffs presented no evidence to permit a reasonable jury to conclude the transfers were retaliatory. I note first that all of these issues have been previously considered by the Court in prior

motions.[3] Specifically, when I denied Defendants' motion for summary judgment, I held that the PLRB's holding did not preclude Plaintiffs from arguing that their transfers were retaliatory. (Doc. 33 at 5.) In addition, in the same motion I considered the timing of Plaintiffs' first lawsuit and the subsequent decision to transfer Plaintiffs as sufficient evidence to support a claim for retaliation. (*Id.* at 6.)

A) The PLRB Board Decision

The findings of facts of state administrative tribunals have preclusive effects in federal cases. *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 797-98 (1986); *see Crossroads Cogenerations Corp. v. Orange and Rockland Utils., Inc.*, 159 F.3d 129, 135 (3d Cir. 1998). The state administrative determination only carries the preclusive effects in federal courts that it would carry in state courts. *Elliott*, 478 U.S. at 799. Under Pennsylvania law, state administrative findings can carry preclusive effects. *See Rue v. K-Mart Corp.*, 713

[3] Thus, these decisions are subject to the law of the case doctrine. "The doctrine of the law of the case dictates that 'when a court decides upon a rule of law, that rule should continue to govern the same issue in subsequent stages in the litigation.'" *In re Resyn Corp.*, 945 F.2d 1279, 1281 (3d Cir. 1991) (quoting *Devex Corp. v. Gen. Motors Corp.*, 857 F.2d 197, 199 (3d Cir. 1988)). Although application of the doctrine is discretionary with the Court, the doctrine is designed to protect such traditional ideals as finality, judicial economy, and jurisprudential integrity. *In re City of Philadelphia Litigation*, 158 F.3d 711, 717-18 (3d Cir. 1998).

A.2d 82 (Pa. 1998). Collateral estoppel applies when the decision in question meets the following four-prong test:

> (1) An issue decided in a prior action is identical to one presented in a later action;
>
> (2) The prior action resulted in a final judgment on the merits;
>
> (3) The party against whom collateral estoppel is asserted was a party to the prior action, or is in privity with a party to the prior action; and
>
> (4) The party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action.

Id. at 84. In deciding whether a prior decision is identical, a court can engage in an analysis of the policies of the previous tribunal compared with the present tribunal to determine the applicability of issues; however, a court must accept facts determined by the original tribunal, regardless of any differences in public policy between the two tribunals. *Id.* at 85.

In the present case, Defendants contend that I erred in my opinion denying their motion for summary judgment when I ruled that the issue decided in the PLRB's ruling was not identical to the issues in the present case. Defendants contend that the "factual issue litigated before the PLRB was whether the transfer decision was motivated by legitimate business

reasons or whether those reasons were merely a pretext *for some other reason*." (Doc. 113 at 36 (emphasis in original).) Defendants do not cite where in the PLRB's decision such a finding was made.

The PLRB framed the issue before it as "whether the OAG committed an unfair practice under PERA." (Doc. 30, Ex. M at 2.) The PLRB then went on to explain that the PERA (the Pennsylvania Public Employee Relations Act, 43 P.S. § 1101.101, *et seq.*) can be violated when an employer retaliates against a public employee for exercising rights under a collective bargaining agreement. The PLRB explained that an employer must be motivated by "anti-union animus in taking the adverse action." (*Id.* at 3.) It concluded that "the record is void of any direct evidence of an anti-union motive or other evidence which could support an inference of anti-union animus." (*Id.* at 3-4.)[4] Thus, the fact which the PLRB determined was that the decision to transfer Plaintiffs was not motivated by anti-union animus.

Defendants assert that because filing legal actions can be a protected activity under the PERA, the PLRB's decision should preclude Plaintiffs from now arguing that they were terminated for filing the *Watson* suit. This does not change my analysis. The PLRB concluded that Plaintiffs engaged in a protected

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[4] *See also* Proposed Decision and Order of the PLRB, Doc. 30, Ex. L at 6. ("[T]he record is void of any inference of union animus.")

activity. Plaintiffs lost their PLRB complaint on the issue of anti-union animus. Regardless of whether "the PLRB could have found that the defendants' legitimate business reasons for the transfers were merely a pretext for retaliating against plaintiffs . . . for exercising their right to file Watson," (Doc. 113 at 38), the PLRB's decision is silent on that issue.

In a slightly different argument, Defendants contend that the PLRB's finding precludes Plaintiffs from refuting Defendants' affirmative defense. Defendants contend that the PLRB's decision conclusively shows that they would have made the decision to transfer Plaintiffs even without the filing of *Watson*. Again, because the PLRB's decision only states that the Defendants were not motivated by anti-union animus, it does not address whether the Defendants would have made the same decision if Plaintiffs had not filed the *Watson* suit. Thus, the PLRB's decision did not preclude Plaintiffs from arguing in the present action that they were transferred in retaliation for filing *Watson*.

B) The Evidence of Timing

Defendants next argue that as a matter of law, Plaintiffs' retaliation claim fails because they did not present sufficient evidence to prove causation. Defendants rely upon the principle established in *Robinson v. City of Pittsburgh,* that timing alone cannot prove causation. 120 F.3d 1286, 1302 (3d Cir. 1997). The Court of Appeals for the Third Circuit clarified this

principle in *Farrell v. Planters Lifesavers Co.*, in which the court explained that causation can be proved by "other evidence gleaned from the record as a whole." 206 F.3d 271, 281 (3d Cir. 2000). The court further explained that timing combined with inconsistent reasons given by the employer, conduct of the defendant toward others, or inconsistencies in a defendant's testimony can create the necessary evidentiary showing. *Id.* The court cautioned that "each case must be considered with a careful eye to the specific facts and circumstances encountered." *Id.* at 279, n.5.

In the present case, Plaintiffs presented evidence beyond mere temporal proximity. Although, I note that the proximity of less than one month between the protected activity and the retaliatory conduct does create a strong inference in and of itself. In addition, Plaintiffs presented testimony of Michael Stiles that differed from the testimony of Defendant Fisher. Michael Stiles testified that in 1998 he told Defendant Fisher that his federal agents could work at the same location as Plaintiffs. (Doc. 108 at 80.) Defendant Fisher testified that Michael Stiles never told him Plaintiffs could work in the same location as federal agents. (*Id.* at 217-218.) This difference in testimony, in combination with the close temporal proximity, allowed the jury to conclude as they did. Moreover, Defendants had a motive for engaging in the retaliatory conduct: their supervisor was the target of Plaintiffs suit. Viewing the evidence in the

totality of the circumstances, there was sufficient evidence to support a finding of causation.

2) New Trial

Under Rule 59(a), motions for a new trial must be filed within ten days of the date the judgment was entered. *See* FED. R. CIV. P. 59. The decision to grant a new trial is left to the sound discretion of the trial judge. *See Blackiston v. Johnson,* No. 91-5111, 1995 WL 563834, at *1 (E.D. Pa. 1995), *aff'd* 91 F.3d 122 (3d Cir. 1996), *cert. denied* 519 U.S. 953 (1996). Courts have granted motions for a new trial where: (1) there is a significant error of law, to the prejudice of the moving party; (2) the verdict is against the weight of the evidence; (3) the size of the verdict is against the weight of the evidence; or (4) counsel engaged in improper conduct that had a prejudicial effect on the jury. *See Maylie v. Nat'l R.R. Passenger Corp.*, 791 F. Supp. 477, 480 (E.D. Pa.), *aff'd* 983 F.2d 1051 (3d Cir. 1992). Where the evidence is in conflict, and subject to two or more interpretations, the trial judge should be reluctant to grant a new trial. *See Klein v. Hollings,* 992 F.2d 1285, 1295 (3d Cir. 1993).

In the present case, Defendants contend that they are entitled to a new trial because: (1) the Court erred in restricting Defendants' cross examination of Plaintiff Micewski; (2) Plaintiffs' counsel's repeated mentions of the Noonan Report prejudiced the Defendants; and (3) the size of the award is against the weight of the evidence.

A) Restricted Cross Examination

Defendants first argue that a new trial should be granted because the Court restricted their ability to question Plaintiff Micewski regarding Judge Yohn's finding that his trial testimony was false. (*See* Doc. 109 at 158-159.) At sidebar, I ruled that questions relating to this matter were irrelevant to the present case. (*Id.* at 159.) I see no basis to reconsider.

Judge Yohn's finding has a significantly prejudicial potential because a jury would be likely to improperly rely upon Judge Yohn's finding that Plaintiff Micewski gave false testimony in prior criminal proceedings and discredit his testimony in the present action. On the flip side, the probative value of that finding has little probative impact on whether Plaintiff Micewski's career was over prior to his transfer. Although Judge Yohn's finding was the basis for the reluctance of city and federal prosecutors to use the Plaintiffs in trying future narcotics cases, this information was not necessary for the jury to understand the state of Plaintiffs' careers prior to the transfers. The record is clear that both city and federal prosecutors refused to work with Plaintiffs, and Defendants were able to argue that this was the motivation for transferring Plaintiffs. The reason for the prosecutors' decisions not to work with Plaintiffs was not relevant to this case. The retaliatory conduct was not the decision to not use Plaintiffs as witnesses, the retaliatory conduct was the decision to transfer Plaintiffs to distant, undesirable, dead-end

positions. Defendants were able to fully cross examine Plaintiffs on issues related to that matter.

B) The Noonan Report

Defendants next argue that a miscarriage of justice occurred because there were numerous mentions of the Noonan Report by Plaintiffs' counsel, but the Court prevented Defendants from discussing the content of the report. The Noonan Report was the topic of several pretrial conferences and motions. The report was an internal document prepared by Eric Noonan, an Assistant Executive Deputy Attorney General, who investigated the accusations against Plaintiffs and concluded that they did not engage in any corrupt activities. During discovery, I ruled that the content of the report was not relevant to the question of whether the Defendants retaliated against Plaintiffs (Doc. 4 at 3) and that the report was protected by attorney-client privilege, and I prohibited Plaintiffs from discovering a copy of the report (Doc. 4 at 7).[5]

At the opening of the trial, I ruled on Plaintiffs' motion to reconsider and clarified my holding. I held that Plaintiffs could mention the Noonan Report but they could not refer to the contents of the report. (Doc. 108 at 23.) Defendants now argue that Plaintiffs'

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[5] The contents of the report were ascertained by Plaintiffs through a draft of the report which Plaintiffs already had in their possession prior to the *Watson* suit.

counsel violated this holding through a series of questions during cross examination and during his opening statement and closing argument. While Defendants are correct that Plaintiffs' counsel's questions did at times refer to the contents of the Noonan Report, I sustained objections to those questions. Moreover, I instructed the jury at the opening of the trial that questions from counsel are not evidence and should not be considered by them. (Doc. 107 at 6.) Thus, there was no prejudice from the questions which referred to the contents of the Noonan Report.

In addition, there were certain questions regarding the Noonan Report which I permitted Plaintiffs' counsel to ask. These questions related to whether a witness had known that the report existed and whether a witness had attempted to see the report prior to deciding to transfer Plaintiffs. These questions were proper because they did not relate to the contents of the Noonan Report; they related to the decision-making process that Defendants engaged in. How the Defendants reached the decision to transfer Plaintiffs is essential to determining whether the Defendants' proffered reasons for the transfers were pretextual. Thus, I find that the probative value of these questions was very high, while there was very little prejudicial value to these questions.

Similarly, Plaintiffs' counsel's first mention of the Noonan Report in his closing argument was made for the purpose of impeaching the testimony of Defendant Pappert. Plaintiffs' counsel only referred to the

fact that the report was attached to the complaint filed in *Watson*, and no reference to the contents of the report were made. Therefore, there was nothing improper in this reference.

Plaintiffs' counsel made two more references to the Noonan Report in his closing argument. These references did comment on the content of the Noonan Report. (Doc. 110 at 102.) However, these references were not for the purpose of showing that the report's content was correct. Instead, Plaintiffs' counsel was quoting the complaint filed in *Watson,* which had been admitted into evidence without objection from the Defendants, to show the potential effect *Watson* may have had on the Defendants. Not only was this explained to the jury in my instructions, (*id.* at 172-73), but Plaintiffs' counsel prefaced his reading from the complaint with an explanation that the information should not be taken as true or false. (*Id.* at 99-100 ("It's not before you to decide this, whether they're right, whether they're wrong, whether this went, it's not before you. . . . It's to show you that this is important protected speech.").) Moreover, Defendants' counsel also elected to read selected portions of the *Watson* complaint in his closing argument. (*Id.* at 127-28.) There was nothing improper in these mentions of the Noonan Report.

I find that the mentions of the Noonan Report by Plaintiffs' counsel were not the result of misconduct, nor did they cause a prejudicial situation for the Defendants.

C) Size of Award

1) Compensatory Damages

Defendants last argue that the award is grossly excessive, and the Court should reduce the amount in lieu of granting a new trial. I will deny this request. As my opinion reflects, there was sufficient evidence to permit the jury to find in favor of Plaintiffs. Likewise, the evidence also permitted the jury to determine an amount of damages Plaintiffs suffered. As I instructed the jury at the close of the case, compensatory damages do not need to be proven by mathematical certainty. The jury found that Defendants transferred Plaintiffs to new work locations which were several hours away from their homes. Plaintiffs had to travel extensive distances for significant periods of time. Evidence submitted by Plaintiffs showed that they suffered emotional stress from the retaliatory actions, burdens of long commutes, and lost time with their families. Given this evidence, the jury's award is not excessive.

2) Punitive Damages

Defendants first contend that any punitive damages are improper because the weight of the evidence did not support an award of punitive damages. Punitive damages can be awarded "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade,* 461 U.S. 30, 56 (1983). "[A]

defendant's conduct must be at a minimum, reckless or callous." *Brennan v. Norton,* 350 F.3d 399, 428-29 (3d Cir. 2003) (quoting *Savarese v. Agriss*, 883 F.2d 119, 1204 (3d Cir. 1989)). Plaintiffs' theory of the case was that Defendants maliciously retaliated against Plaintiffs after they exercised their First Amendment rights by filing a lawsuit. Although a finding of retaliation is not sufficient to permit punitive damages, *Brennan* 350 F.3d at 429-30 (discussing *Smith v. Wade,* 461 U.S. 30), the evidence in the present case was sufficient to support the jury's finding that Defendants acted intentionally or with reckless or callous indifference.

Defendants next contend that the punitive damages are grossly excessive and should be reduced. The Supreme Court in recent years has provided guideposts for determining when an award of punitive damages is so grossly excessive that it violates the constitutional limits of due process. *E.g., State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 418 (2003) (citing *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 575 (1996)). In *BMW v. Gore*, the Supreme Court evaluated the degree of reprehensibility of a defendant's misconduct, the disparity between actual or potential harm to the plaintiff and the punitive damages awarded, and the difference between punitive damages awarded and potential civil penalties authorized or imposed in comparable cases. 517 U.S. at 575.

There is a degree of reprehensibility to the actions of Defendants. The jury found that the Defendants

intentionally transferred Plaintiffs in direct response to the filing of the *Watson* suit. This act in and of itself contains an offensive nature because it violates our fundamental notions of proper state action and demonstrates a disregard for First Amendment rights guaranteed in the Constitution. Additionally, the jury's conclusion inevitably means that Defendants' articulated motive for transferring Plaintiffs was a pretext for a more invidious motive. Furthermore, Plaintiffs submitted evidence that although their transfers were identified as temporary, they were *de facto* permanent, which also suggests a level of gross unfairness in the manner in which Defendants treated Plaintiffs.

In evaluating the proportionality of the punitive damages award, the Supreme Court has explained that an award of punitive damages must have a "reasonable relationship" to the compensatory damages. *Id.* at 580; *see also Campbell,* 538 U.S. at 425. Without creating a bright-line rule for reasonableness, the Court explained that punitive damages awards "more than 4 times the amount of compensatory damages might be close to the [constitutional] line." *Gore*, 517 U.S. at 581 (internal quotations omitted) (citing *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 23-24 (1991)). The Court reiterated this position in *Campbell,* 538 U.S. at 425 (citing *Gore* and *Haslip*), and further explained that "[s]ingledigit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution. . . ." *Id.*

In the present case, the jury awarded the following amounts:

For Plaintiff McLaughlin:

Defendant	Actual Damages	Punitive Damages
Fisher	$ 12,500	$ 100,000
Pappert	$ 100,000	$ 200,000
Sarteschi	$ 25,000	none
Kwait	$ 100,000	$ 200,000
Caggiano	$ 12,500	none

For Plaintiff Micewski:

Defendant	Actual Damages	Punitive Damages
Fisher	$ 12,500	$ 100,000
Pappert	$ 100,000	$ 200,000
Sarteschi	$ 25,000	none
Kwait	$ 100,000	$ 200,000
Caggiano	$ 12,500	none

The punitive to compensatory damages ratio for all the defendants except Defendant Fisher is 2:1. This ratio is well below the often cited 4:1 ratio expressed by the Supreme Court as acceptable. In the case of Defendant Fisher, the ratio of punitive to compensatory damages is 8:1. This ratio still satisfies the "single-digit ratio" requirement created in *Campbell,* but it begins to teeter closer to the line of excessive. Moreover, it is difficult to explain the higher ratio in the case of Defendant Fisher, especially in view of the lower amount of compensatory damages

against him. It can only be that the jury determined a relatively higher amount of punitive damages because he was the Attorney General at the time. The record, however, does not support a higher rate of punitive damages. He was not the primary operative regarding Plaintiffs' transfers. While he did approve the actions taken by his subordinates (the other Defendants), it is difficult to say that the level of egregiousness necessary for punitive damages was greater in his case than the other Defendants. Therefore, I find that this award is excessive, and I will reduce the award of punitive damages against Defendant Fisher from $100,000 to $25,000 for each Plaintiff.

Thus, I will grant Defendants' motion for new trial with respect to Defendant Fisher unless each Plaintiff remits the excessive $75,000 of punitive damages awarded against Defendant Fisher. Plaintiffs will have twenty days from the date of the Order to remit.

CONCLUSION

I will not grant judgment as a matter of law because the PLRB decision did not find facts regarding the same issues that were litigated in the present case. I will also deny judgment as a matter of law because the evidence submitted by Plaintiffs was sufficient to support a finding of retaliation. Because the jury's award of punitive damages against Defendant Fisher was against the weight of the evidence,

Plaintiffs have twenty days to each remit $75,000 of the punitive damages award or I will grant a new trial for Defendant Fisher. I will otherwise deny Defendants' motion for new trial because the restrictions on Defendants' cross examination of Plaintiff Micewski were not improper, Defendants were not prejudiced by the restrictions in discussing the Noonan Report, and the awards for compensatory and punitive damages were otherwise not excessive.

An appropriate Order will follow.

March 7, 2005 /s/ A. R. Caputo
Date A. Richard Caputo
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN R. McLAUGHLIN and CHARLES MICEWSKI,	:	No. 3:00-CV-521
Plaintiffs,	:	
v.	:	(JUDGE CAPUTO)
MICHAEL FISHER, GERALD PAPPERT, BRUCE SARTESCHI, DAVID KWAIT, and JAMES CAGGIANO,	:	
Defendants	:	

ORDER

(Filed Mar. 7, 2005)

NOW, this 7th day of March, 2005, **IT IS HEREBY ORDERED** that Defendants' Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial (Doc. 73) is **GRANTED in part and DENIED in part**:

(1) Judgment as a matter of law is **DENIED**.

(2) A new trial will be **GRANTED** to Defendant Fischer unless within twenty (20) days each Plaintiff remits the excess of $75,000 in punitive damages against Defendant Fisher.

(3) Defendant's motion for new trial is otherwise **DENIED**.

March 7, 2005
Date

/s/ A. R. Caputo
A. Richard Caputo
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-4329

JOHN MCLAUGHLIN;
CHARLES A. MICEWSKI,

v.

MICHAEL FISHER; GERALD PAPPERT;
BRUCE SARTESCHI; DAVID KWAIT;
ROBERT VON SCIO; JAMES CAGGIANO

Gerald Pappert, Bruce Sarteschi,
David Kwait and James Caggiano,

Appellants

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 3:00-cv-00521)
District Judge: Honorable A. Richard Caputo

SUR PETITION FOR REHEARING

Present: Lourie*, *Circuit Judge*, Restani**, *Judge*, Oberdorfer***, *District Judge*

The petition for rehearing en banc filed by Appellees John McLaughlin and Charles A. Micewski in the above-captioned case is construed as a petition for panel rehearing. Because Appellants' motion to appoint an out-of-circuit panel to hear this case was granted, en banc rehearing is not available. The petition for panel rehearing having been submitted to the judges who participated in the decision of this court, and no judge was concurred in the decision having asked for rehearing, the petition for rehearing is denied.

By the Court,

/s/ Jane A. Restaini
Judge

Dated: June 19, 2008

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* Honorable Alan D. Lourie, Judge of the United States Court of Appeals for the Federal Circuit, sitting by designation.

** Honorable Jane A. Restani, Chief Judge of the United States Court of International Trace, sitting by designation.

*** Honorable Louis F. Oberdorfer, Senior Judge of the United States District Court for the District of Columbia, sitting by designation.

CMD/cc: Karl A. Fritton, Esq.
W. Thomas McGough, Esq.
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Charles L. Becker, Esq.
Amy Z. Snyder, Esq.
Samuel C. Stretton, Esq.
Donald A. Bailey, Esq.